Conduct

Thoughts are not punishable, they have to be manifested by an overt act
Reasons:

1. Difficult of trying a mental state
2. Impossibility of punishing every person with an evil thought
3. Reluctance to punish people's thoughts - when they don't bring about any harm
4. Difficulty of distinguishing between a thought and an intention in absence of supporting behaviour

The slightest overt manifestation is sufficient.

Conduct has to be a human act (exceptions company as juristic person and agency of animals)

Conduct has 3 forms

1. State of affairs
2. Omissions
3. Commission

State of affairs

R v achterdam 1911	Accused was sleeping in a constables garden when the police officer found him. He chased him out onto the street and arrested him for being drunk in a public place. This is a state of affairs. Ad held- that it was *not an act by the accused that caused the state of affairs*, the conduct was of the police officer and not his own. *Not convicted*

S v Brick1973	Accused was charged with possession of obscene materials, in contravention of a statute at the time. He had just returned from a business trip. He said that the materials were mailed to him anonymously from overseas - and he argued that he had intended to hand over the material to the police but because he was exhausted from the trip he hadn't done it yet. 2 judgements convicted him but for different reasons: J1 - interpreted statute very strictly and held that in possession means you are guilty and prosecuted. The problem with this is that when the officers seize it they are in possession and therefore guilty. J2- stated that legislature could not have intended the absurd result of J1. held that *an accused is liable for a state of affairs as long as he allows state of affairs to continue* In order to prove conduct for state of affairs- the conduct is evidenced by the fact that accused allowed state of affairs to continue

	If material was outside , unopened and he made an effort to contact police - then he would not be convicted.

Examples

If accused let state of affairs continue in Q -ten conduct is proved (Brick)
If it says the obscene materials was found in his cousin's bedroom- state of affairs not created by accused. Cousin created state of affairs - accused escapes liability (achterdam)
But if he knew what was in the bedroom- he let state of affairs continue (brick)

OMMISSIONS

General Rule: the law does not impose a duty on us to act in favour of someone else , especially if that involves a risk to ourselves. We are regarded as autonomous beings , responsible for our own well being. The law seeks to maximise individual liberty.

Min of police v Ewels 1975	**Created General rule and exceptions** A police officer on duty had witnessed the assault of a prisoner by other officers Court held- he had a duty to assist *Authority: even though we apply the general rule , we look to the **legal convictions of the community** to decide when a person ought to have acted.* In exam : state general rule then look if legal conviction of the community would require a duty to act.

Exceptions

a. **Where you have created a potentially dangerous situation, you are under a duty to protect danger from materialising**

If X lights a fire in an area with dry grass where there is a children's playground, liable for consequences of walking away (conduct in form of omissions is walking away)

R v miller (eng case)	Accused staying at someone's house and lit a cigarette which he left on a mattress when he fell asleep. The mattress caught alight and accused moved to another room Conduct in the from of omissions is failure to put out the fire Court - his prior conduct of creating the dangerous situation placed him under a legal duty to prevent danger from materialising.

Haliwal v JHB municipal council 1912	municipality laid cobble stones on a public road , they became smooth and harm was caused when the plaintiffs horse slipped and plaintiff fell out of the carriage. Court - omission of municipality to fix the road meant they created a potentially dangerous situation which they were under a legal duty to prevent from materialising.

Silver Fishing 1957	a ship with a crew on board drifted for 9 days. The owner of the ship was informed a number of times via distress calls. An action was brought against the owner for someone who died during these 9 days. Owner had to pay. Court - *omission can be a failure to act even without prior conduct.* (but this can be argued that prior conduct was sending ship out to sea).

b. **Control of a potentially dangerous animal or thing**

Rule: where an accused assumes CONTROL (not ownership) over a dangerous animal or thing, he is obliged to guard against it causing harm.

S v Fernandez 1966	accused was working in a baboon cage and while doing so he failed to secure animal in enclosure. Baboon escaped and killed a baby nearby. Court - baboon was under control of the accused and accused took no steps to restrain him. A reasonable person would have provided restraint and the omission to do so was criminal. *Convicted even though he was not owner - rule says control*

R v Eustace 1948	Accused failed to control his vicious dog who bit someone. Convicted of culpable homicide. *Your conduct can include if you set an animal on someone*

If you just bought a dog from spca and it bit someone- a reasonable person may have foresee = neg
If your dog has bitten before= you had foresight to a real possibility = murder
But test both possibilities in exam.

c. **Where a special protective relationship can be established**

Min of police v skosana 1977	police had a man in custody who complained of stomach cramps and failed to take him to hospital. Detainee died because a doctor was only called much later. Court- police were liable because the *moment someone is taken into*

	custody protective relationship exists and by virtue of their office they had a duty to protect detainee.

S v B 1994	*a parent is under a legal duty to protect their child from drowning because a special protective relationship exists.*

S v A 1993	mother convicted of assault because she failed to prevent her lover from hitting her children.

(protective relationship can extend to step -parents)

R v chenjere 1960	*Where a protective relationship is assumed, there is a legal duty to protect*

d. **Public Office**

Rule: someone in public office may be under a duty to protect but you can only utilise public office whilst that person is on duty.

S v Gaba	accused was a police detective in company of other detectives who were conducting an interrogation - which surrounded whether detainee was a street gangster. The detective knew this to be true but failed to reveal it to his colleagues and his failure resulted in him being found liable for defeating the ends of justice

His duty was in his capacity as a detective to aid interrogation.

(min of police v ewels likely to fall under public office)

e. **Legal duty can come about by -By contract (pittwood) by statute or by court order**

Voluntariness

In order to have a crime we need conduct - and this conduct has to be voluntary to be legally reprehensible. (you cant attract liability for events not under your control)

NB! Always state conduct has to be voluntary

Idea: punishment is fair if crime is committed by choice

Legal definition: *to be voluntary conduct must be subject to the control of ones own conscious free will.*
REQ: **must be able to subject your body to your own conscious will** - decision does not have to be rational
AUTOMATISM: involuntary conduct which can serve to negate the AR element of a crime (no conduct)

Sane	Mentally sane and only momentarily act in an involuntary manner	Negates conduct	No punishment
Insane	Person suffers from a mental pathology	Negates capacity	Go to mental institution

Distinguish between absolute and relative force	Absolute: y pushes x's finger on the trigger - involuntary Relative: y puts a gun to X and tells him to pull trigger- not involuntary , actions justified via necessity.

Crystallised categories of voluntariness

i.hypoglaecemia
ii.Somnambulism
iii.Epilepsy
iv.Extreme intoxication

Somnambulism

R v Dlamini 1955	Accused was sleeping in a dimly lit room and was dreaming of faces at his window and ppl assaulting him - in a semi conscious response to the nightmare he stabbed the deceased who was reaching down to pick something up next to Dlamini Court held- there was no bad blood between accused and deceased . Accused semi conscious state negated voluntariness and there was thus no legally relevant conduct.

Epilepsy

R v Mkize 1959	M was an epileptic and was charged with murder of his sister who he stabbed with a knife. He was cutting meat when he suffered from an epileptic fit and she was standing nearby. Court held- M at the time of killing was not acting in a voluntary state and because of the fit the stabbing was result of blind reflex.

Use the above two cases to show automatism and the cases below for AL in crystallised categories

<u>Antecedent liability - acto in libera causa</u>

The act is not in the individuals power - the cause of the act is

(e.g. :if dlamini knew he had propensity to act out his dreams, his involuntariness would be negated by AL)

Even though at the time of the killing the accused was involuntary the accuse can still be held liable if prosecution can prove AL. AL negates state of involuntariness.

Was there a voluntary act immediately prior to the automatic state?

epilepsy

R v Victor	accused was charged with negligent and reckless driving , he had an epileptic attack on a public road and collided with a pedestrian. V raised the defence of automatism and said at the time of collision he was not acting voluntarily. Experts gave evidence and said in his case he would receive a **warning signal** before an attack- s**o if he had a warning signal he did act recklessly. Prosecution** could not prove beyond a reasonable doubt that he had a warning signal. Alternative argument- even if V didn't have a warning signal, he knew he had epilepsy so if it was serious to the extent that he knew he shouldn't drive- he could be negligent. Court held- V **knew of his condition** but still proceeded to drive - found liable on the basis of prior voluntary conduct. (in exam go through dolus and culpa to find what acc. Is liable for)

S v Schoonwinkel	accused was driver in a motor vehicle and he had an epileptic fit which caused him to collide with another car and kill 2 people. Argued at the time of collision in exam he was not acting voluntary as he could not subject his movements to his own free will. S also had **rare epilepsy where the symptoms had not presented themselves fully.** **Had only 2 prev minor attacks which had happened over a year ago.** Court - established there was automatism (dlamini and mkize0 • Was there AL (prior act and dolus/culpa) His prior act was driving with knowledge he had epilepsy But from obj factors he didn't know it was a real possibility, a reasonable person would not have had foresight= no dolus, no culpa, no liability

We need to distinguish between medical conditions which exist at the time of conduct and those which exist after (brought about as result of accident) { if person says they have amnesia and it happened after accident will not negate voluntariness}

Hypoglycaemia

S v van Rensburg	accused involved in ac collision and charged with negligent driving. He had hypoglaecemia and on the day in question he had blood tests done and the

	pathologist didn't warn him he might become drowsy. The evidence further revealed he only became drowsy whilst driving and then collided with other car State argued that under such circumstances a reasonable person would pull over and not continue to drive Court held- state had not proved beyond a reasonable doubt that a person not forewarned by a medical expert that they should take additional care would know to pull over if they are steadily losing consciousness into a mental blank.

Intoxication

Law divided into pre 1981 & post 1981

Def: being under the influence of any substance (law further distinguishes between voluntary and involuntary intoxication)

Pre 1981
Voluntary intoxication was morally reprehensible and this led to decisions based policy as opposed to law.

R v Johnson	accused was arrested on a charge of being drunk in a public place. He was locked in a cell with an old sleeping man, in a fit of drunken rage he killed the old man with a bucket. J argued he should not be held liable because he was so drunk he was not conscious of what he was doing. Court held- whilst accepting that J was drunk and in certain circumstance this can affect your ability to control your own conscious will, on policy grounds it cannot be easier for a drunkard to escape liability than a sober person. (extent of his intoxication could not be proved beyond reasonable doubt - convicted with culpa).

Post 1981

S v Chretien	**Overruled Johnson- there can be no liability for an involuntary act even if involuntariness is brought about by something morally reprehensible.** **Intoxication will only affect voluntariness if you can say accused is "dead drunk".**

For AL -your prior act CANNOT be drinking (unless its a situation where you know you get aggressive when you drink, or you know you have a very low tolerance and drink uncontrollably)

Sane automatism vs. insane automatism

S v Mahlanze	**Authority for distinction** A woman killed her 6month old child and she said she did it in a state of **hysterical disassociation.** It was found her post natal depression had turned into a mental illness. She was not liable on basis of capacity *Insane automatism: when an unconscious involuntary action is a result of a mental illness which is brought about by a pathological malady.* *Sane automatism: caused by a temporary malfunction of the mind cause by external stimuli (*in exam say what the external stimuli is) In this case a state of sane automatism turned into insane automatism - it has become a pathology.

S v stellenmacher	Court focused on distinction between san and insane automatism Accused was on a strict weight loss diet for past weeks and on the day in question he had not eaten and performed physical labour. He went to a local hotel and drank half a bottle of brandy then had an altercation with another patron at the bar- he took out his gun and shot someone. He argued involuntariness. Evidence was led by experts who said he suffered from sane automatism due to hypoglycaemia **Is it IA or SA** **For IA need expert evidence to prove.**

S v Kok 2001	Accused was a superintendent with SAPS, charged with 2 counts of murder and 1 of attempted murder. He drove to Botha's house and shot and killed Mr. and Mrs. with a 9mm pistol. Whilst shooting was in progress the son emerged from the bath and accused pointed a shotgun at him but he managed to escape. Accused argued the following in his defence: At the time of the shooting he lacked criminal capacity [he argued IA(saying he has a mental illness) instead of SA because there probably wasn't enough evidence to show external stimuli needed for SA] He had medical evidence from psychiatrists and the doctor testified that police officer was suffering from major depression as result of his service with SAPS which exposed him to house robberies, captives and drugs. The doctor further suggested that the officers state was not caused by a psychotic illness and should be regarded as sane automatism. Court held

	• sane automatism is a legal term (not psychiatric) which describes something other than mental illness, because a person suffering from a mental illness will be admitted to a mental institution acc to s78 of criminal procedure act. • There is no requirement that mental illness has to be psychotic , and it was clear that the officer was suffering from something other than SA (thus went to institution) NB part of the case • Case is further authority for distinction between SA and IA • Confirms that SA can lead to a pathological problem, and this problem doesn't have to be psychotic. (events police officer exposed to = external stimuli , and his depression was SA but it led to a mental illness , therefore IA) In south Africa there is a presumption that you are sane - so it is up to you to prove otherwise on a balance of probabilities. This is why he had psychiatrists testify.

S v trickett	a young woman who was apparently physically and mentally healthy raised defence of a blackout during driving Even though the court found her to be a credible witness, she was convicted because she had not adduced sufficient evidence for either SA or IA. Because of lack of evidence court didn't know if blackout was the result of a mental illness or external stimuli. **Confirms evidentiary burden is on the accused to bring medical experts and make a case of SA or IA.**

Causation

10 April 2010
04:47 PM

An issue if it is unclear who caused death

AR requires unlawful, voluntary conduct - and that conduct has to lead to the unlawful consequence (death)
There must be a causal nexus between the initial act and the ultimate consequence.

(causation is a requirement for all consequence crimes-where the act isn't prohibited, it is the consequence which is unlawful)

2 types of causation need to be proved
Factual causation and legal causation

Factual causation

(DON'T FORGET !)

To establish FC we use the "but for" test **: but for X's conduct , would Y have died <u>WHEN HE DID?</u>**

If answer is no , then X is the factual cause
If Y would have died when he did, then X is not the factual cause

(for an omission ask: but for X's failure to act, would Y have died when he did)

If someone is the factual cause they are the *condictio sine qua non* to the unlawful consequence (fc of the death)

S v Hartmann	Accused was a doctor who deliberately killed his 87yr old father , who was in a great deal of pain from incurable cancer Court held- the son had **hastened death** , albeit even a short time. He was found to be the condictio sine qua non- FC of his father's death

The problem with FC is that it throws the scope of liability too wide

Ex: A and B shoot C in the head simultaneously, using the but for test neither are the FC because C would have died from the 1 shot regardless of the other and vice versa.

In this situation ask if acc. Conduct materially contributed to death - if yes = FC (2 FCs in this situation)

Legal Causation

Purpose: narrow the scope of liability - *to establish whether the accused conduct is the sufficiently closest link to the unlawful consequence.*

3 tests to prove causation

1. Proximate cause test
2. Adequate cause test
3. Nova causa intervanes

Moketi : it was held that not 1 test is conclusive , all 3 need to be looked at to determine legal causation.
Based on policy, fairness and justice.
Not every test can be applied to every situation *and the tests are merely factors to consider in determining the sufficiently closets link.*
(exam: look at all 3)

BUT NCI is the most important because an intervening event precludes the accused from the closest cause of death.

(NCI purpose is to find an event to break the chain of events between accused conduct and the unlawful consequence)

<u>Proximate cause test</u>

Q: what in terms of time and value was the closest cause of death?

S v Hartmann : son administered painkillers, **hastened death ,** therefore he was the closest in value and time.

<u>Adequate cause test</u>

Q: in the ordinary course of human experience , does the act have the result ensued? (does the conduct normally cause death in the circumstances)

Nova causa intervanes

Q: has there been a disruption in the causal sequence?

Test what you think the disruption is against the following

Requirements	• Intervening event must be **unusual, abnormal and unsuspecting** • **Independent of accused conduct** • In itself must be the **Factual cause**

Factors that allow us to prove the requirements for NCI

1. **Foresight**

What is unusual? The accused must not have been able to foresee it (req. 1)

S v Grotjohn 1970	during an argument between a married couple the wife threatened to kill herself. The husband handed her his gun and said go ahead. She killed herself FC : but for the husband handing her his gun would she have died when she did? no - husband is the factual cause LC: he argued that her suicide was an NCI which broke the chain of events between handing her the gun and her subsequent death. Further evidence revealed that she suffered from depression and marriage had been bad for some time. Court- where X encourages Y to commit suicide, X can be said to be the cause of death unless the suicide is an unsuspected event , independent of accused conduct. Here she was depressed so it was not unsuspected.

2. **Pre -existing conditions and susceptibilities**

Rule: if a pre-existing condition presents itself, it is never an NCI because you take your victim as you find them(the thin skull rule)

R v Laubsche 1993	A victim was hit over the head with a stick which caused an open wound. The victim was poor and uneducated and neglected to go hospital. He contracted an infection and died

	But for the accused hitting the victim would the victim have died when he did? No = accused is the factual cause The accused argued that he was not the legal cause, there was an NCI in the form of the victim's omission of going to hospital Court held - (req 1) there was nothing unusual in an uneducated person not going to hospital and the infection is normal in the circumstance. *Auth: the thin skull rule doesn't only apply to physical susceptibilities but also societal and mental pre-conditions.*

R v Blaue	an 18yr old girl was stabbed and medical experts suggested she need a blood transfusion because without it she would die, being a Jehovah's witness she failed to agree and died. Blaue charged with culpable homicide (not murder because DE couldn't show foresight from a stab wound beyond reasonable doubt) Court held- the accused put her in that predicament and it was not independent of accused conduct (req 2). The thin skull rule must be applied to mental pre-conditions and religious convictions.

S v Moketi 1990	Injured person shot between the shoulder blades and rendered a paraplegic. But after medical treatment he improved and could go back to work. 4 months later he was re-admitted to hospital suffering from pressure sores and septicaemia, because he had failed to sufficiently shift his position to relieve pressure as doctors had told him Q: is the accused liable for death or his victims failure to shift an NCI? Court a quo convicted accused of murder but the appeal judgement changed the conviction to attempted murder. Court gave guidelines to establish if accused conduct is too remote from the unlawful consequence o If the failure to obtain medical treatment is the immediate cause of death (in blaue the cause of death was bleeding - not refusing treatment) o If injury cause by accused is not inherently mortal o Where the failure to obtain medical treatment is objectively unreasonable (Blaue - const. Protects religion) Here the immediate cause of death was failing to shift.

3. **<u>Medical intervention (exam!)</u>**

-

R v Mabole 1968	X stabbed C in the abdomen, wound was not particularly dangerous but C's condition continued to deteriorate , so doctors performed exploratory surgery Surgery confirmed there was no penetrating wound but the surgery itself caused a blood clot. *Auth : provided that medical treatment is given with goodwill and efficiency it cannot be an NCI unless the treatment is grossly negligent.*

Macwilliams 1986	accused shot X in the neck - causing considerable loss of blood. X received medical treatment and was out on respirator. When brain activity ceased , the hospital disconnected the machines and she died Accused argued that switching off the machines was an NCI Court - there was no improper medical treatment and the disconnecting the life support was terminating a fruitless attempt at keeping her alive. She died as a result from eh shot in the neck and life support was only an attempt to keep her alive when she would usually be dead.

(bile in abdominal cavity cases)

S v Ramasunya	accused stabbed mother in law in her collarbone. She was treated for 6days in hospital and discharged. She died at home 1 day later due to sepsis of the lungs. Autopsy revealed that the sepsis could have had a number of causes Accused argued gross negligence on behalf of the hospital and this was a NCI Court - based on medical evidence there was a reasonable possibility that stab wound and sepsis were not related. *Auth: courts are reluctant to hold that emergency medical treatment will be an NCI but if there is a reasonable possibility that it could be an NCI - there is no liability.*

S v Counter	a man was estranged from his wife and he went to her house one evening and some commotion ensued. He then fired several shots and 1 bullet hit her in the buttock and unbeknown to her or medical experts it caused viral septicaemia, she contracted pneumonia and died Husband argued that the medical staff were negligent in not discovering septicaemia and this was an NCI. Court accepted the following o Doctor found an entry but no exit wound o Degree of bleeding was not unusual o Dr. Did a renal exam with fingers

	o No internal wound was found with fingers o Since her condition was stable, there was no need for further examination o x-rays did not reveal any further injuries o Dr kept carful clinical notes of every step o A full spectrum anti-biotic was prescribed o Patients condition did gradually improve and it was sudden when she died of multiple organ failure. Court - at the time of death the original wound was still an operating wound and was a substantial cause of death - it could be said to have caused death. *Auth : only if medical treatment is so grossly negligent and overwhelming so as to make the original wound merely part of the history of events leading to death could it be an NCI. If original wound is still operating=no NCI*

Tembani	Accused shot girlfriend during an argument & a shot hit her in her abdomen and it caused bile and bowel matter into her abdominal cavity causing septicaemia. If left unattended this injury would have been fatal but evidence showed that proper and timeouts medical treatment would have saved her. She was left unattended for 4days and received nothing but basic medical care , died from septicaemia It was accepted by court that hospital was understaffed and overworked. Q: was the potential negligence of hospital an NCI? Court - rejected accuse argument that it is an NCI, and at the time of death the original wound was still operating and a substantial cause of death. *Auth: victim should be treated as if they never went to hospital (if wound was operating and sub. Cause of death) unless there is gross negligence.*

4. **<u>Successive assault</u>**
   situation where 2 or more blows constitute on ultimate death

   <u>General Rule:</u> legal cause of death is generally the mortal blow
   The person who dealt the 1st blow is the legal cause if it was mortal BUT if a subsequent blow combines physiologically - then the initial blow is not an NCI

   Ex: if A shoots B in the shoulder with 9mm and C shoots b in the abdomen with a shotgun
   The mortal blow is from C - so C cannot argue that A is an NCI because his shot would cause death anyway (A is independent of C - req 2)
   But if A's wound combined with C's - C cannot be an NCI iro A

S v Burger	Accused assaulted X with a few hard kicks to the stomach. Medical evidence later established that it caused perforation of the small intestine. 2 days later X was attacked by another 2 men and died shortly after Who is liable? Medical evidence further revealed that the initial kicks caused death

	and subsequent assault hastened death. Court- since the original wound was mortal and it would by itself have caused death- the later injury is not an NCI

S v Mbambo 1965	A threw stones at C on the head injuring him severely and causing C to fall on the ground. B (independent of A) stabbed C in the chest. The stabbing was a mortal blow FC: but for A would C have died when he did? No - A rendered him an easy target LC: B is the proximate cause but is B an NCI? Court said wound by A was not mortal, also wounds did not combine physiologically. Then went through NCI req. Unusual, abnormal and unsuspecting? Yes , he didn't know B Independent of A? Yes Is C the factual cause? Yes A was found not guilty because there was no causation.

Daniels	1st and 2nd accused were being driven by the deceased in a taxi when a fight ensued. The taxi stopped and the 1st produced a gun and deceased started to run away - 1st shot 3 shots. The 2nd accused followed the deceased and another shot is fired, it is unclear who fired the shot. The deceased had 3 bullet wounds - 2 in the back, 1 in the ear. Forensics concluded that cause of death was brain damage from the bullet to the ear but it was also revealed that the deceased would have died from the shots to his back in half an hour without medical treatment Liability of 1st accused *Court favours liberty and gives accused benefit of the doubt* Therefore court took the most favourable view and assumed head wound was caused by the 2nd accused Court was divided: Nicholas j: 2nd accused head shot would serve as an NCI but because the parties were acting in common purpose- causation falls away. Trentgrove j: felt there was no common purpose so considered causation Accused must be judged by what DID HAPPEN and not by what would have happened. Even if 1st accused had only shot him in his feet - he would still be immobile and the head shot would have killed him . So 2nd accused was an NCI (different from mbambo - where easy target= liability) But maj held- 1st accused rendered him an easy target and someone has to be liable

In exam dist between D an M and the types of injuries causes, talk about easy target but still use all 3 tests to make a decision

(mistake. in exam) [Q on mistake] [with part on fault] !!!!

Summary Negligence

Definition: objective standard - it is wrongful to be negligent because law requires standard of care to citizens and failure to conform is negligence

Intention: Did the accused *subjectively* foresee death or harm

Negligence : should the accused have foreseen
dependent on Standard of a reasonable man.
Negligence not because You did something , which is criminal, but because he falls Short of reasonable man when fails to do Something a reasonable person would have done.

Test	*: kruger v Coetzee* 1) would reasonable person in position of accused foresee 2) would a reasonable person have taken steps to guard against 3) were steps taken. Q.I and Q.2 establish what a reasonable person would do Q.3 tests accused conduct-gains what reasonable person would do.

What is the standard? Who is the reasonable man?
Sv Burger = diligence paterfamilias
adult member of household

Burger also confirms we dont expect too much from head of household -They require Prudent common sense

Mbombela-there is only I reasonable man and the implication is that it is the average law abiding citizen who adheres to the Constitution.

Problem: we live in heterogeneous society

Qualifications to ruling in Mbombela [only I standard)

1) There is a high standard of care for people who proffess to possess expert / specific skills
Is this really a qualification?
NO-we dont require a different standard-we expect that a reasonable person doesnt say he has Specialised skills when he doesnt.

2) if individuals who have specialised knowledge
This is a qualification: if you do possess Skill you will be held to a high standard-a reasonable man with that Skill.
Are we going against general rule? You can say that this is a qualification or you can say it isnt

BUT
Mahlahela confirms if you are an expert you are held to the reasonable standard of that expert.

3) Specific words "in position"
Some argue it makes test subjective
Counter arg-look only at external, objective position (objectively ascertainable)
Authority: s v southern : what would a reasonable bus driver do

Foresight
what must reasonable person foresee?

MR must extend to every element of the crime
So if crime is culpable homicide = negligence must extend to harm

Elements of culpable homicide= unlawful negligent killing of a human being
Therefore you need to be negligent I.R.O human being and death. (not only bodily injury)
[Above Gen Principle]

Van der Mescht	Case with melting of gold amalgem . Majority as to negligence stated that to prove culpable homicide (neg) it would have to be proved that a reasonable man in position of accused would have to foresee DEATH resulting from melting of amalgam.

S v Bernadus	dealt final blow to versarri doctrine. Whether a person could be guilty of culpable homicide if he assaults another and causes death: only under circumstances where death could be reasonably foreseen. majority per Stein J : for culpable homicide the state must prove that reasonable man would foresee death as a possible result. IF reasonable man does foresee something short of deathth (injury) you cannot have culpable homicide otherwise You are applying Versarri doctrine J Holmes (2nd judge): holds that when there is possibility of a Serious Injury then surely death is foreseeable. Injury and death are cause and effect in normal course of human experience. Rumff (3rd judge) as long as some bodily injury is foreseeable then death is always reasonably foreseeable. Because death is highest degree of bodily harm and reasonable person will foresee that a minor assault may cause unexpected death. 2nd and 3rd judgements are dissenting judgements Reasons to go with majority • Court favours liberty • if reasonable people wouldnt have foresee death , you couldnt have fallen short of reasonable man standard.

S v van As 1976-	an altercation occured when X gave Y a hard slap on his cheek. as a result Y, who was a very fat man, lost his balance fell boat wards and hot his head on cement floor and later died. Applying judges tests Stein - he would not be liable for culpable homicide Holmes - not liable, no foreseeability of serious injury Rumff - liable for culpable homicide [in negligence-no thin skull rule : only used to prove causation. But even if you use it to prove causation the person probably wouldnt have been able to foresee thin skull and wont be found negligent] Court held-at the trial court convicted of culpable homicide on appeal guilty only of assault (followed majority per stein) AD held that it couldn't be proved beyond a reasonable doubt that a reasonable person would foresee victim falling backwards and hitting his head. MAJORITY HERE LAID DOWN BY RUMFF (he repudiated his claims in bernadus) Practically the statement Holmes made may hold true because not every injury will result in death.

Blackwell v S 2007	Confirmed **a serious assault would mean a reasonable person would foresee death as a result**- but each case must be determined on its own merits. SCA confirmed holmes test but subject to the facts in each case. Notionally court accepts it but obj. Factors of the case need to be looked at. If you assaulting someone and causing serious injury - factors like this are not sufficient. Look at weapon of assault etc.

EXAM TIPS : look at past papers but dont spot, generally pp will tell you what will def be tested

- Q1 - ommissions, voluntariness, causation and fault
- Q2 - mistake, abberatio c4 -c8
- Q3 - intoxication and provocation
- Causation will be coupled with mistake
- Know AL and all versarri doctrine stuff
- Ex. Did he have a duty to act? Issue is ommisions
- Who caused death, issue causation, discuss nci for every party

- Is he liable for murder, issue DE

MISTAKE

Fault is an MR requirement which must extend to every element of a crime!

Where a person commits an voluntary act and MR has been satisfied and accused caused death, he can still escape liability if he raises the defence of mistake.

Mistake is a defence which goes towards negating the fault element of a crime

EX: If you want to kill X but end up killing Y
Voluntariness and causation not affected
Unlawfulness may or may not be affected
But what is definitely affected is intention

Q: can your mistake serve to negate fault?

Mistake deploys fault but it is NOT A GROUND OF JUSTIFICATION

Difference between justification and mistake	when conduct is justifiable - it is potentially excusable. All elements of a crime are present. But when you have mistake an element of the crime is negated. This does not render conduct justifiable. It means one of the grounds has not been met , so there is no liability.

2 categories of mistake

1. Mistake of fact
2. Mistake of law

Mistake of fact

The definition of murder is : the intentional, unlawful killing of a human being

There will be no fault (MR) if accused:

Didnt appreciate it was a human being he was killing	**Mistake of fact** - solely to do with objective factors in the circumstances
Didnt appreciate that his actions would cause death	Not mistake!! Here your foresight didnt extend far enough (could be negligence iro remote possibilities)
Didnt appreciate that the killing was unlawful	Mistake of law- eg you think you are acting in self defense when you arent

No fault = no liabilty (MR didnt extend to every element of the crime)

Does mistake affect the formulation of intention?
(does mistake extend to every element of the crime)

EX 1: A shoots and kills B, thinking B is a dog barking at his window incessantly.	MR has not extended to every element of the crime. A does not have intention iro killing a human = mistake of fact
EX 2: A is leaving a party and takes a coat from the rack that looks like his, he is then charged with theft.	Crucial element of theft is taking property of another. A has no MR extending to that element of the crime = mistake of fact

To determine the liability of A - *despite mistake was there dolus?*

IS the accuseds mistake such as to exclude the foresight of the possibility of the unlawful consequence? (for DE)

If yes = no dolus = no liability

In the coat example:

If there was only 1 coat	yes, because of the 1 coat he had to assume it was his where he left it, no fault
If there were 5 coats	If all 5 looked the same the answer would be NO, because he should foresee he might not be taking his own

Culpa : would a reasonable person in the position of the accused have foreseen the possibility of unlawful consequence despite the mistake?

If yes= accused was negligent

Principle for mistake :

Here the test of mistake is not whether the accused mistakenly believed something but rather *did accused foresee that his act might cause the death of a human being despite a mistake of fact?*

Idea is that a person is capable of having a mistaken belief and yet still subjectively foreseeing that harm will ensue. (thats why in mbombela- it wasnt argued as mistake)

You have to have foreseen SPECIFIC harm that occurred, because mistake will only deploy intention if it makes the foresight impossible. DE

No negligence if the mistake would have prevented a reasonable person from foreseeing.

Error in objecto - an error relating to an essential element of a crime.

In order for mistake to negate fault element it has to be a material mistake.

What is material/essentail? Differs from crime to crime
Rape= consent'

Murder= killing of a human being

Situation 1- A shoots B thinking B is a dog.	mistake is to killing a human. No dolus - no intentional killing of a human being Mistake as to an essential element = error in objecto = no liability
Situation 2- A shoots B thinking B is C	Mistake of killing a particular human being. (fact) but Fits definition for murder No mistake as to an essential element (wanted to kill a human being) , no error in objecto = there is liability *Mistake is not such as to exclude the foresight of the unlawful consequence* (he knew he could shoot the wrong person)
Situation 3- A shoots B who stole his watch, B is weaing a black shirt and runs away, a jogger in the same shirt comes running round the corner and A shoots jogger	Mistake of fact- but your intention is to kill a human and so it cant serve to exclude fault.

Mbombela -no intention of killing a human being = no liability for murder but a reasonable person would have foreseen that despite the mistake it could be killing a human (it had human feet) so liable for culpable homicide.

Mistake of fact def in exam!

Abberatio Ictus
going astray of the blow - a circumstance where the consequences turn out differently from what the accused expected.

NO MISTAKE- it is a description of a factual situation

A wishes to kill B but misses and kills C	How is this different from mistake? A has pictured what he is aiming at correctly, not confusing B and C but through lack of skill misses. IN exam dont use AI as a convicting factor- it is only description of the situation.

AI vs error in objecto

An error in objecto is an error to an essential element of a crime.

The idea in AI is to test whether in this factual situation all the elements of a crime are still met (fault in particular)

If a puts a poisonous substance in B's drink but C ggrabs it and drinks it:

A was directing his will at B , it was in B's cup - therefore AI not mistake. AI needs something going wrong and not according to plan.

2 approaches to AI

Pre 1962 v post 1962 (BERNADUS 1962)

Pre 1962

A would be liable for murder- his intention towards B (dolus) would be imputed to C
Courts applied doctrine of transferred malice based on versarri. (called policy approach)

R v kuzwayo	An assasin for hire was mandated to kill an individual outside his residence.the assasin fired and injured the victim, he fired another shot which killed a passerby. Court a quo convicted him of murder he appealed AD- even though the accused did not specifically foresee the killing of a passerby - he must have foreseen killing someone. Where a person intended to kill and did kill , even though not the intended person - he is liable for murder

who is Reasonable

R v khoza 1949	Accused instructed his 8yr old daughter to place poison in neighbours medicine bottle. She instead put it in a drum of drinking water, where from another child drank and subsequently died Court- the accused should be convicted of murder even though the person killed was not the one intended. Confirmed prosecution did not have to prove intent iro actual victim

Post 1962

Courts started following an alternative approach and began to utilise the *concrete intent approach.*

We follow it today - we have to apply ordinary MR principles. (contemporaneity priciple)

DE is sufficient: if we apply this to khoza - use obj factors to make an inference did he foresee? Yes an 8yr child makes mistakes
Real possibility? Yes someone could egt hold of medicine bottle
Reckless? Yes he still did
DE proved = murder

But if we found it was not the only inference to be made - we look to see if we can prove negligence.

If A shoots B - misses and kills C

DE - could he foresee? Make inference , eg A cant shoot , C was standing right next to B
Real possibilty - yes
Reckless yes
= murder

If A couldnt see C , C was in a bush
The only inf. Isnt that he could foresee
Test neg.
A reasonable person wouldnt foresee soemone hiding ina bush = no neg

AI is a description of a situation. The only way it can help the accused is if he couldnt foresee the possibility and / or a reaonble person would not have foreseen killing actual victim.

S v mtshiza 1970-	minority - unless you can prove fault iro actual victim, you cannot secure a criminal conviction

S v tissen 1979	A fired a shot at a particular person on a busy street intending to kill him. The bullet richocheted off the street and hit a passerby. accused was convicted of attempted murder iro intended victim and common assault iro passerby. Court- acknowledged this was a matter of AI and in obiter confirmed that if accused did not have an intended victim he would still be liable on the basis of dolus indeterminatus.

S v Raisa 1979	A woman was being attacked by a man with a knife and she held her child inf ront of her for protection - both were stabbed and neither died Accused charged with 2 counts of assault with intent to do grievious bodily harm Court a quo found him guilty on both charges AD - liabilty concerning the child this is a case of AI - the accused could only be convicted of assault if DE could be proved. (case then sent back to court a quo to prove intention)

S v mavhungu	an accused and others conspired to kill his mother in law. When acccused got to the house his partned ran out claiming the killing was done, but he had killed her boyfriend (ignore common purpose) Accused convicted of murder and he appealed saying he was only an accessory to

	murder Argument before the AD was that this was a case of AI since blow directed at another AD-not AI since they didnt miss the intended victim. The will and actual intention was directed at boyfriend (sleeping in bed) and this is a mistake of fact! Error in objecto - no!

Mistake as to causal chain of events

MR must extend to every element of the crime - therefore must extend to causation, the causal chain of events.

X drives to Y's house to kill him, but on the way he hits a pedestrian who later turns out to be Y. This is an example of causal chain differing from what accused foresaw.

Mistake as to causal sequence may negate liability but only in so far as it hampers AR and MR from co existing.

So if you plant a bomb on the back end of the bus (dolus indeterminatus) and it goes off in the front of the bus - doesnt affect liability because you intended to kill people on the bus.

<u>Mens Rea in relation to unlawfulness and mistake of law</u>

we need to distinguish between mistake of fact related to unlawfulness and mistake of law	• When you make a mistake of law, you are mistaken about what the law says • In mistake of fact, you mistake facts only and the mistake facts lead you to not intend to act unlawfully

Ex 1	A is walking in a dark alley at night and he feels a natural Sense of fear and trepidation. Out of the shadows B rushing towards A with a sharp knife in his hand. A believes B intends to kill him so he shoots him dead with his pistol. It later transpires that B was a knife vendor trying to sell to A. A charged with murder This is a mistake of fact going towards negating unlawfulness. A intends to kill another human being (dolus) but he didnt intend to do so unlawfully because he believed he was under attack. (self defence would not lead A to being acquitted because there was no imminent harm or objective attack) He can escape liability saying he made a mistake of fact and he didn't intend to act unlawfully. (MR did not extend to unlawfulness)

Ex 2	A sees Trespassing on his property and he thinks he is **ENTITLED** to kill someone if they are on your land and they have been forewarned by a sign. A charged with murder This is a mistake of law Effect same as ex1 - both believe they are killing someone lawfully but there are different consequences and requirements to be proven.

Generally-a mistake means you had no intention to act unlawfully - so there should be no liability but mistake of law more complex

2 approaches

Pre de blom & post de blom.

Before de Blom: *Court applied the maxim that ignorance of the law was no excuse*
Everyone was presumed to know what the law was.

Rv Sachs 1953	accused charged with contravening a banning order under anti communism act. Evidence suggested he contravened the order on advice at Senior counsel and his advice was wrong A's defence was he didn't know he was acting unlawfully. Court - *ignorance of the law is no excuse*

This was such a hard rule, judges invoked the notion of *claim of right*
(not in CL but came about in practice)

If you could wake an argument that you believed you were **ENTITLED** to act, the court held that that this was a mistaken claim of right and depending on fairness, you could escape liability

R v Rabson -	how claim of right operated. X charged with contravening an ordinance by bringing certain protected plants into Transvaal from Mozambique. He did this without the necessary permit, Evidence showed he approached Various horticultural experts, and was told he only needed the permit he already had. He believed he was **entitled** to bring in these plants because of existing permit. He was acquitted on basis of bona fides claim of right.

There needed to be a change in the law because claim of right was just like mistake of law

S v De Blom	changed how we approached mistake of law

	Mrs De blom was an Argentinean national living in SA . She was at the airport to visit her mother in Argentina. Her luggage contained 20k in bank notes and further 20k in her hand luggage, also jewellery worth 14k in her suitcase. She was charged with 2 counts of contravening exchange control regulations (1 for money , 2nd for jewellery) Her defence was she didn't know she couldn't take money out of country. Court a quo - convicted on her on ignorance of law principle. AD - at this stage of our legal development it must be accepted that ignorance of law principle can no longer exist. In light of contemporary notions of fault you either have to - foresee you are breaking a law (dolus) or if a reasonable person would foresee that your actions ar5e illegal(culpa) *Confirmed mistake of law will exclude MR if* *Dolus: mistake is essential to crime* *Culpa: mistake is essential and reasonable* Court had to answer 3 questions 1. Does the crime require MR if it is a statutory offence 2. What form of MR is required 3. How do we apply new mistake of law 1. Courts favour liberty and so fault needs to extend to the offence unless the statute had a positive statement to the contrary 2. If we take a situation at its best then the fault that will be needed is dolus (harder to prove). So dolus for currency and culpa for the jewellery. 3. Dolus - looking at the objective factors the only inference that could be made is that she must have foreseen it would be illegal .(she had travelled widely, she was not a credible witness, not as unknowing as she portrayed herself). Culpa- (she had allot of jewellery and on previous trips had travelled with this much and returned) it was inferred she intended to return with the jewellery. *Choose the fault that favours the accused the most*

IN EXAM!! Mistake of fact and mistake of law are similar because they both go towards negating unlawfulness and intention . In exam Q discuss both but only apply 1. if facts unclear or no statute given say " assuming SA law ENTITLES you so such and such conduct - it is a mistake of law or mistake of fact"

Application of de bloom

S v Du toit	A charged with contravening a statutory provision which prohibited conveying patrol in a container which is not your petrol tank His defence is he didn't know about the law.

	Court - RULE : *where a person works in particular sphere or is linked to that sphere of activity (i.e. motorists use roads - should know regulations) ignorance of the law is no excuse*

Reliance on legal advice

S v waglines 1989-	A was a company conducting a cartige business. They conveyed paper bags without the necessary permits and this was in contravention with statute. They had old permits and were not aware that they needed new permits because they had consulted with a transport expert and their advocate In this case the fault required was negligence - mistake must be reasonable and essential. Court - a company should have known that lawyers disagree and l*awyers only give opinions and not the law*. *The nature of* the cartage business is full of regulations and a reasonable man should acquaint himself with all those regulations. Another important factor is the urgency for need of advice - if very urgent maybe you had to rely on advice. *More time = less excusable.* A reasonable company would have known just getting advice is not enough

S v long-distance	A transported goods illegally on his lawyers advice Negligence was sufficient (usually neg in statutory crimes) Court - legal advice has no magic and doesn't justify its recipients not acting with common sense. Some lawyers advice may be so bizarre that even the most unintelligent client will go elsewhere. Also looked at the fact that he had received warnings before so he should have foreseen that his lawyers advice was wrong.

S v claasens	A charged with contravening a statute in the way he wanted to run his business His defence - he consulted an attorney and advocate and both said there would be no problems

Self study. not examinable

Intoxication and provocation important for exams

<u>Menes read in relation to statutory offences</u>

Under CL NR is always required because fault is an element of a crime.
In statutory crimes the position is different because legislature can create any crime and it might not require fault (therefore it is strict liability)

QUESTION 1: how do we know if MR is required at all?

It depends on intention of legislature
3 possibilities in statute:

a) MR is expressly required
b) when MR is expressly excluded [strict liability]
c) No express indication of either

a. Where MR is expressly required certain keywords indicate it "maliciously, knowingly, willingly, fraudently"
   These words imply intention even though they have different meanings, so if there are keywords you need to look at the context and the surrounding circumstances

b. there are very few strict liabilities left - most are traffic offences. This is because we favour liberty and crimes should be proved beyond a reasonable doubt.

c. Most statutes are silent on the matter and courts need to use indicators to see if MR is required
   Factors
   i. Language and context of the provision
   ii. Scope and object of the provision (what degree of harm will the crime manifest)
   iii. Nature and extent of punishment (more severe the punishment - the less likely that negligence will suffice)
   iv. **Overriding rule- in the absence of clear and convincing indications that legislature did not intend MR to be required , the benefit of the doubt goes to the accused and MR is required.**

QUESTION 2 : what form of MR is required?

In past courts construed silence on the part of legislature as an indication to create strict liability. But since strict liability has fallen to disuse , silence is construed as a lesser from of fault sufficing.

In order to determine what form of fault the legislature required , courts look at a number of further factors:

i. What is the prohibited activity? Do we want people to maintain a high level of caution (how badly do we not want ppl to do it , if very bad = culpa, easier to prove and stop people)
ii. Is the offense a dangerous and prevent social evil? (if crime is very dangerous and we want to convict more -ppl in society = culpa)
iii. The severity of the penalty (a very severe penalty means it is less likely that culpa will suffice - eg life or death sentence)

S v Melk	A was charged with being in possession of a publication banned by the internal security act His defence: he didn't know it was unlawful- mistake of law

	De Blom: dolus=essential ; culpa= essential and reasonable Court had o establish what MR was required: 1. MR is required because there is no indication to the contrary 2. The MR required was dolus: it is impossible to know or suspect that a publication is illegal (if you get a book as a present, you wouldn't know it is unlawful unless you opened it and read it and the context revealed its illegality to you)

S v du toit	Petrol in container example Court - since statute does not say anything to the contrary MR is required. Q2) court looked at whether there was wide publicity of the petrol shortage and the offense, also the purpose of the offence was to stop ppl hording petrol so everybody could have a fair share. Factors pointed to culpa because objectively ppl knew of offence. Culpa= mistake was unreasonable

Waglines	Transport paper bags without permit Court - in absence of indications to the contrary in the statute MR is required. Q2) factor: you are dealing with a trade that is heavily regulated and involves a lot of paper work. So it is unreasonable not to know of new rules = points to culpa

(no need to study cases in more detail than this)

S v Arenstein	Accused was required to report to police station because of a notice delivered to him ito Internal security act. He didn't present himself and said he was unable to make it because of professional concerns and he forgot Court - in absence of indications to the contrary in the statute MR is required. Q2) object of the act was to have control over movements of suspects and the object would be defeated unless a high degree of care required to ensure compliance. Culpa was necessary

S v Unverdorben	Accused was an immigrant in SA for 4months and was in possession of illegal videos He didn't know it was illegal in SA Court - in absence of indications to the contrary in the statute MR is required. Q2) similar to melk. Being negligent is not enough because a high degree of care isn't required because someone could have just sent it to you ; MR= dolus

Amalgamated Beverages	A was a bottler and distributor of soft drinks and was charged with

Industries v Durban City Council	contravening a statute preventing distribution of any contaminated food articles. Accused sold a bottle containing a bee Court - in absence of indications to the contrary in the statute MR is required. Object of the act was to protect public welfare and to protect distributor against delictual claims. Manufacturer should also have had measure in place to protect this. A high degree of care is required and so culpa is required

Mr in relation to statutory offences will be a side question.

Ex: some children are on the playground and J decides to teach F a lesson. He wees in his juice bottle but the bottle is then drank by W who gets very ill
Issue 1 : abberatio icctus - is there MR for the juice bottle incident - yes (sigwala and mini)

Principal find out and beats J
Issue 2: corporeal punishment is illegal
Its illegality has been widely punished, children deserve a high degree of care
MR = culpa (de blom - can he use mistake of law)

Intoxication

17 April 2010
02:28 PM

(if intoxication is involuntary = no liability)

2 kinds of defences we have learnt

1. Those that exclude MR
2. Those that exclude unlawfulness

Intoxication can fall into 3 categories

a. Negate voluntariness
b. Negate fault
c. Negate capacity (depending on degree)

Historically capacity could only be excluded by youth or insanity , but Chretien changed that.

Capacity: can the accused appreciate wrongfulness
can accused act in accordance to that appreciation

Chretien said "dead drunk" - cant act voluntarily subject to AL (in exam!)
But if you are dead drunk you also cant act in accordance with youth appreciation of wrongfulness - technically you have no capacity

Def: intoxication is understood as the intake of alcohol but for legal purposes it also includes injection or inhalation of mind altering substances.

Effect: it can render you involuntary (Chretien)

Assuming A is still voluntary, intoxication can exclude intention . If accused is involuntary it will affect capacity.

Can you be voluntary and not have capacity?

Yes, the degree of intoxication to be involuntary is dead drunk.
But the degree needed to affect capacity has to be such that it affects your ability to act in accordance with your appreciation of wrongfulness
(i.e. you can drive in your car drunk and be voluntary but your accordance to act in appreciation may be affected, you know you could hurt people but your drunken state stops you from acting in accordance with appreciation)

EXAM: arguably you are voluntary but intoxication has affected your capacity. Capacity needs a lesser degree of intoxication.

Test for capacity could be a problem because then anyone can use intoxication to negate capacity

To avoid this the law made an amendment to the Criminal Procedure act s1(1)
The act makes it impossible for anyone to use intoxication capacity as a defence

Problem with the act
the offense is using capacity as a defence for voluntary intoxication . So the elements are voluntary intoxication and capacity as a defence

If you argue involuntary intoxication - you are proving capacity. Being intoxicated with no capacity is then the offense of which you convicted.

So the best argument seems to be that intoxication affected your ability to formulate intent.

JUB JUB

- Wont argue capacity
- Wont argue involuntariness because it will be negated by antecedent liability and involuntariness will prove capacity which act doesn't allow
- So he should argue that intoxication affected his ability to formulate intent and his ability to foresee

S v hartyani	A was charged with drunk driving, he voluntarily consumed 4 beers and a coffee. Unbeknown to him the coffee container a substantial amount of brandy Court - it was reasonable possible on evidence that A didnt know about brandy and was found not guilty.

Intoxication affecting voluntariness

21 April 2010
04:45 PM

Law is divided into pre 1981 and post 1981

BEFORE 1981

Voluntary intoxication could never negate liability

GEN RULE: if you commit any crime whilst intoxicated you could never fully escape liability.

To give effect to this the law distinguished between specific intent and ordinary intent crimes.

You could not get away with ordinary intent crimes (culpable homicide) but could with specific intent (murder)

Courts were finding people liable on policy grounds - the distinction was made by courts and not legislation.

S v Johnson	J not guilty of murder because he lacked specific intent due to intoxication BUT court did convict him of culpable homicide where ordinary intent sufficed. J found guilty on policy grounds.

Problems

- Specific and ordinary intent were never defined
- Rules were contrary to the principle that liability must be based on voluntary conduct *with a guilty mind*; judges should not be making law except through precedent. Policy is made with law by Parliament.

Chretien	C had been at a social gathering and he consumed a fair amount of alcohol, there was some discontent at the gathering and C purported to speed off in his car in a rage. He proceeded to drive into a group of people standing just outside the gate. Killed 1 and injured 5 Charged with 1 count of murder(specific intent) and 5 counts of attempted murder (specific intent) for which the competent verdicts are culpable homicide(ordinary intent) and assault(specific intent) respectively. C argued that in his intoxicated state he believed the people would move out of the way. ***His formulation of intent was affected by intoxication.*** C did not argue involuntariness because he was not dead drunk as he could still operate a car a few seconds after getting into it. Court a quo - it was reasonably possible he didn't foresee the possibility of people not moving out of the way and he was acquitted of all specific intent charges and charges with 1 count of culpable homicide. A question of law was referred to AD " whether on facts was judge correct in allowing intention to be affected by voluntary consumption of alcohol?" AD - even common assault requires intention and if intention is lacking because of voluntariness, mistake , intoxication or anything else - there can be no liability Intoxication can affect the formulation of intent and court accepted it could lead him to

	believe people would move OVERRULED JOHNSON - that intoxication can affect voluntariness , intention and capacity. (but to affect voluntariness must be dead drunk)

Effect on intention (dolus): it can effect - do DE test
use obj to make an inference and if you were so drunk that the only inference that can be made is you believed ppl would move for example the DE test fails and move on to culpa

So the best defence to raise for intoxication is that it affected your formulation of intent because it is the easiest to prove by inferences

Effect of intoxication on culpa

The test for negligence is objective.

The standard of negligence is the standard of one reasonable man (mbombela)

Law says a reasonable man does not get drunk to the extent that intention and voluntariness are affected, a reasonable man is not prone to overindulgence and knows when to stop
- so culpa (at least) will always be present if you argue intoxication because we follow 1 standard.

So when you cant show dolus, you can always show culpa because of 1 reasonable man standard.

Effect of intoxication on capacity

2 fold enquiry

1. Can accused appreciate the difference between right and wrong
2. Can accused act in accordance with that appreciation of wrongfulness

(it is what COULD A appreciate - not what A OUGHT to have appreciated)

With intoxication - if you are intoxicated you still know what is right or wrong but your intoxication affects your ability to act in accordance with that intoxication.
So you could use capacity to negate liability

So the law stepped in...

Criminal Law Amendment Act 1 of 1998
(ensures people who are intoxicated voluntarily cant use capacity As a defence)

S1 (1) -any person who consumes or uses any substance which impairs his faculties to appreciate wrongfulness or to act in accordance with that appreciation while knowing that substance has that effect and who, while Such faculties are impaired, commits any crime BUT IS NOT CRIMINALLY LIABLE BECAUSE HIS FACULTIES As AFORESAID , SHALL BE GUILTY OF AN OFFENCE AND SHALL BE LIABLE ON CONVICTION To PENALTY NORMALLY OF THAT CRIME

- If you consume alcohol and lack capacity while knowing it will affect you and commit a crime - you are not guilty under common law but you are committing an offence in terms of this act.

Elements at offence are

1) Consumption or use of intoxicating substance by accused
2) An impairment of faculties (lack capacity)
3) knowledge that substance consumed had effect of impairing faculties
4) Commission of a crime
5) Not Being criminally liable because your faculties were impaired

State must prove these elements for you to be guilty of this offence

- If you argue involuntariness , you are saying that you are dead drunk, when you are dead drunk you cant control your body and hence your faculties are impaired - so element 1 and 2 are then proved. So in effect you are helping the state convict you of the above offence.

Would this apply to Chretien	no he argued that formulation of his intent was affected not that he didn't have capacity. Act only applies to incapacitation.

EXAM: JUB JUB MUST ARGUE FORMULATION OF INTENT

QUESTIONS ABOUT THE ACT

i. Will a person who lacks intent but has capacity be liable?
NO, act only applies to people who lack capacity due to intoxication, so defence of formulation of intent remains best common law defence.

ii. Will a person who becomes involuntarily intoxicated be liable?
NO, by interpreting the words consume or use - it implies voluntariness, as does the word knowingly.

iii. If a court a quo acquits you because of incapacity , does the prosecution have to prove incapacity again from scratch?
YES, state must still prove all the elements of the crime
(remember normally state is trying to prove capacity but for this offense they want to prove incapacity)

CASES

S v Langa	A charges with housebreaking with the intent to steal and theft

	He raised the defence that intoxication affected his ability to act in accordance with his appreciation of wrongfulness. He succeeded in this defence under the common law but court a quo went on to convict him of offense in s1(1) of CLAA. AD - with CLAA state must prove beyond a reasonable doubt that accused lacked criminal capacity and if they are not able to prove incapacity beyond a reasonable doubt - no liability for accused under CLAA.

EXAM: look at facts given - e.g. mar Lange didn't even know where he was and admitted it, so incapacity beyond reasonable doubt could be proved.

S v Mbele	State failed to prove capacity - meaning initially A was successful in arguing intoxication affected his capacity, so state went on to convict him according to CLAA Conviction went on review Court - in terms of the act state has to prove incapacity beyond a reasonable doubt and if state cannot do so- there will be no conviction. If A argues he didn't have capacity , cant go to Act straight away , Because what A needs is to prove incapacity on a balance of probabilities and state has to prove beyond a reasonable doubt (A only needs to poke holes in states prosecution) So if you can reasonable show you were incapacitated , it means state still has to show you were beyond a reasonable doubt. (NB)

Capacity -	acting in accordance with appreciation of wrongfulness ,doesn't extend to foresight

Formulation of intent	Extends to foresight Affects dolus - try to prove If you cant def= negligence Do not use AL!! Wasn't involuntary! Don't need to prove voluntariness if person is voluntary

provocation

24 April 2010
09:30 AM

Provocation

Any Wrongful act or insult of such a nature is Sufficient to deprive an Ordinary person of Power of Self control

Question of fact

Can affect the following elements

1) voluntariness	Someone can do or say something so bad you lose ability to Subject body to conscious will Counter arg-if you were involuntary, you wouldn't have done what you did - Very hard to prove Involuntariness-because you were acting and subjecting your body to your will
2) Fault	can affect your ability to properly formulate intention - whatever someone did or Said is so Sever that it renders you incapable of intending to kill them or of foreseeing death might ensue from what you do Counter arg-if you argue you did Something because you were provoked-means you intended it. Provocation evidences your Intention to retaliate
3) capacity	In most instances accused argues that provocation affected his ability to act in accordance with his appreciation of wrongfulness (because of the limitations of the other 2 models)

Req for capacity

1) could A appreciate wrongfulness
2) Could A act in accordance with that appreciation

Problem: the test is too subjective
How we really know if he could act in accordance?
(test solely relies on accused say-so - usually victim is dead and cant give account of what happened)

RV Arnold 1985	A was 41 and married to a 21yr old woman, he had a Son from a previous marriage who had a hearing disability and was somewhat slow. Wife did not get along with son and insisted Son go in Special home. However wife also insisted that her mother move in with them, and mother suffered from a hysterical condition and it put a Strain on marriage. A was infatuated with his wife and was also very jealous. He was under a lot of Stress and one day when she hadn't returned on time a fight ensued , he also had a gun on him which he needed for work purposes. During the argument he wanted to Know where she had been and what she had been doing. In an attempt to mock him she exposed her chest and Said She wanted return to stripping and he shot her. he argues he was so provoked by the stress from his son and his mother in law coupled with his jealousy he doesn't remember pulling trigger and he argued that he couldn't act in accordance with his appreciation of wrongfulness. Court acquitted him on basis that from the facts it appeared he wasn't acting consciously (he couldn't remember), there was a reasonable doubt that he wasn't he wasn't acting consciously - so he was involuntary . But even if he was voluntary , he would be lacking criminal capacity

S v Panther 1987	A couple had been married for nine months and been together for a few yrs, they a 9yr old daughter. The husband constantly abused and assaulted his wife in the presence of their daughter. He mocked her religion, he would make her stay awake and keep away the evil spirits which she believed in, he also called their child a burden and said his wife ruined his life. On the day in question he was in a bad mood and had already assaulted her in the morning then insisted she help him hang his bird cages. He threatened her

	with a screwdriver and in her fear she couldn't hold the cage straight and he drilled a skew hole. He then made her get on her knees and pray that the hole would go straight - whilst on her knees she pulled out a gun and shot him 3 judgements J1- accepted her testimony that she had an irresistible urge to kill him due to the long periods of abuse, this negated her ability to act in accordance with her appreciation of wrongfulness , she had no capacity and shouldn't be liable J2- didn't feel there were enough facts to show she was incapacitated J3- was wrong on the law and said you could only be incapacitated due to a mental defect. By majority she was found guilty (Q in class: what is your opinion)

PROBLEM WITH PROVOCATION:

Test is too subjective and based on facts judges may differ on whether you had capacity or not.

(also contrasting the above two cases - men had more equal rights than woman)

Battered woman syndrome(not in exam!)

The only available defences are private defence or provocation, and provocation is subjective. The problem with private defence is that An attack has to be imminent but most woman kill whilst husband is sleeping or his back is turned - so this defence is not always available.

Engelbracht	court held - if pattern of abuse is so constant that it become s a cycle and that another attack is almost inevitable then private defence is a successful defence. (here the requirement of imminence has been relaxed.)

/

Counter arg to this

- Why not leave
- Why not turn to Domestic Violence Act
- The say-so of a woman is too subjective (too easy to fake evidence and kill a spouse)

But the question remains : can provocation serve as a defence which negates capacity even thought he test is subjective?

S v Wiid	Accused and husband were married for 32yrs and had 2 children. 1 was mentally disabled and the other was a rebellious son. Due to his recklessness the son had a car accident and become paralysed and developed a speech impairment nt. The duty of care was entirely on the accused and husband refused to help, he also had several extra-marital affairs. Accused suspected her husband again of having an affair and while he was gone she invited a friend over to console her. When he returned she confronted her husband in front of her friend and an argument ensued, she then brought out a tape recorder and proceeded to play out their arguments in front of her friend. In an attempt to retrieve the tape her husband hit her over the head and when she came to from the blow she shot her husband

	She was acquitted on the basis that she did not have capacity - couldn't act in accordance with her appreciation of wrongfulness. This was a 1990 case and compare this to previous decision where the woman actually had been abused. (there needs to be consistent difference between hot-headed people and people who actually don't have capacity)

S v mkonto	A had two brothers die and believed the deaths were brought about by an evil woman, when he confronted her she told him he wouldn't live to see another day, he struck her and killed her He argued he was provoked to such an extent that he was able to act in accordance with his appreciation of wrongfulness. He was acquitted based on the subjective test

S v potgieter 1994	Court held that provocation and extreme emotional stress being looked at subjectively may result on leniency for hot headed pal who take the law into their own hands Court warned against rewarding hot headedness and theorist with academics have been calling for the introduction of an objective test when dealing with provocation.

S v Eadi 2002	Introduction of obj. Test While driving home one evening from a sports club (intoxicated) E was involved with an altercation with another driver. It wasn't clear if either driver overtook E then slowed down or if the other driver drove behind E with his brights on. At a robot E got out of his car and when the other driver opened his own car door E struck it with a hockey stick, he kicked driver with both his fit and hit him in the face, he then dragged the driver out and continued to hit him in the face and step on his face with his heel breaking his nose, the driver died as a result of assault. E's defence was that he lacked capacity State was successful in arguing that test for loss of control was the same test as for sane automatism. We look for obj factor s to establish AL. When A acts in an aggressive and goal directed manner spurred on by anger or some other emotion - he is obviously able to direct and control his actions. It is then credulous to accept incapacity as a defence . Because if they are able to direct their actions they are able to act in accordance with their appreciation of wrongfulness. *We must test accused say-so against tangible evidence of their state of mind(eg report from psychiatrist that they have an anger management problem) , their prior and subsequent conduct (did they have be taken to hospital to calm down)and the courts experience of of human behaviour and social interaction.*

	This is the introduction of objectivity into a subjective test.

FOR exam, know the tests limitations and how it changes with objective approach.

The elements of a crime are (1) conduct (2) fault, (3) unlawfulness and (4) capacity.
Fact that there has been conduct and fault does not automatically create liability. State must also prove no ground of justification/ unlawfulness

even if the accused satisfies all the elements of a crime, he can be acquitted if there is a ground of justification raised regarding the unlawfulness element.

If an act is justifiable in the circumstances then the accused conduct is not unlawful.
The element has not been negated though!

Courts have developed a number of grounds of justification that serve to justify conduct that would otherwise be unlawful.

- Private defence: defence of self or property
- Necessity: either by forces of nature or human compulsion you are forced to act in a way you wouldn't normally act , incl. Circumstances beyond your control. (earthquake forces you to speed, hijacker makes you shot the passengers)
- Consent: generally no harm is done to someone who consents (has limitations)
- Impossibility
- Superior orders
- Dominus non curat lex

Unlawfulness embraces disapproving judgements by the legal order, and all acts (no matter who commits them) have the potential of being unlawful - so someone without capacity can act unlawfully.

Unlawfulness is a judgement in respect of the act and NOT an MR judgement which takes into the account the accused state of mind.

Differences in defences negating unlawfulness(AR) and defences negating fault (MR)

- if the crime is a strict liability crime (no fault is needed) then defences negating MR (fault) are of no assistance to the accused BUT a defence excluding unlawfulness will always serve as a defence. So practically a ground of justification is always the best defence

- The different standards used to test for fault (culpa v dolus) are irrelevant for an enquiry into unlawfulness.

- Defences that exclude MR are to a certain extent dependent on a subjective enquiry (dolus) whereas unlawfulness is dependent on an objective enquiry.

Onus of proof

In criminal proceedings the state retains all the onus of proof- so state has to prove all the elements of a crime , therefore prove that you acted unlawfully.

Causing harm by way of a positive act is *prima facie* unlawful.

General Rule: unlawfulness is assumed at the outset because somebody has been harmed BUT this doesn't negate the State's onus of proof, they need to prove you acted unlawfully beyond a reasonable doubt.

IMPLICATION: any positive act causing harm is unlawful if there is no ground of justification raised, this implies the state must prove beyond a reasonable doubt that there is no ground of justification.

The accused has an evidentiary burden to bring some evidence to the court of a GOJ.
Evid, burden is not an onus!

Once the accused has done this the state will try disprove the ground of justification.

State maintains the onus to be discharged beyond a reasonable doubt. Acc only has an evidentiary burden to prove a GOJ on a balance of probabilities.

NB! If the accused is able to prove it on a balance of probabilities then it means the state has not discharged its onus of proving unlawfulness beyond a reasonable doubt.
If the prob. Exists that there is a GOJ then there is a reasonable doubt as to unlawfulness.
If the state has proved unlawfulness beyond unreasonable doubt then the acc has not discharged his evid. Burden.

R v Ndlovu	Summary • State has overall onus of proving a crime beyond a reasonable doubt. • Generally it is not difficult for state to prove unlawfulness because it is *prima facie* unlawful to cause harm • If accused does not dispute unlawfulness by raising a ground of justification it remains assumed • Accused has an evidentiary burden to put forward some evidence of a ground of justification -usually in the form of the elements of that ground - this must be proved on a balance of probabilities • If the accused manages to prove GOJ on a balance of probabilities then state did not prove unlawfulness beyond a reasonable doubt. State can only prove unlawfulness by disproving the GOJ beyond a reasonable doubt.

Are the GOJ limited to the ones we have set out?
No, technically unlawfulness is based on the legal convictions of the community , so theoretically it is possible to create new GOJ.

PRIVATE DEFENCE

(priv def = usually def of property ; self def = used to suggest def of self ; both used interchangeably)
GOJ for unlawfulness

Definition : a person who is the victim of an unlawful attack upon his person, property, or any other legally recognised interest may resort to force to repel such an attack as long as the force in necessary and reasonable in the circumstance.

There are elements that relate to the attack and to the defence of the attack

Attack must be	• Imminent • Upon a legally recognised interest • Unlawful
Defence has to be	• necessary to avert harm • A reasonable response • Directed at the attacker • Aware he is acting in self defence

Test for private defence

R v Hele	The test for private defence is objective but courts will put themselves in position of the accused and view the matter in light of the circumstances

S v mugwena	This case suggests that law imposes strict limits when taking a life - so killing will only be justified if it was necessary and reasonable in the circumstances Necessary meaning that killing was the only way to avert the harm and reasonable meaning that accused must have reasonable grounds for believing he was in danger. Both of these are objective enquiries and court will draw inferences from the factors available. (practically, every element should exist obj, not only in mind of the accused)

Elements of private defence
Imminent attack

Either the attack must be imminent (just about to happen)
OR must have already commenced but is not yet completed.

GEN RULE: fear alone is not sufficient- there must be a real threat of attack.

The requirement of imminence is different for self defence and defence of property.

IMMINENCE FOR DEFENCE OF PROPERTY.

Van wyk case	VW was a shop owner and had been victim to a number of burglaries. VW had made various attempts to stop the burglaries at his shop to no avail. As a measure of last resort VW set a trap at his shop door which when activated as the door opened would trigger a gun aimed low at the doorway. VW also placed a clear warning sign outside his shop One evening when an intruder entered he was shot and died. VW raised the GOJ private defence in response to the charge of murder and court *a quo* acquitted him.

	A question of law was sent up to AD Can a person rely on private defence where he kills or wounds another in defence of his property? If yes, was the imminence requirement met in this case? J stein - necessary force in defence of property will sometimes include deadly force. Property of an owner will not be looked at as having lesser value than life of the assailant. So if the only reasonable way of avoiding your property to be stolen is death , private defence can be used. (no comment on 2nd Q) J Rumpff- it may be reasonable to kill to protect property. As to the 2nd Q - in the case the moment in which the trap was set off is the moment the door opened and this does not constitute a commenced attack. It would only be trespassing and trespassing is also not an imminent attack. The law does not entitle you to kill a trespasser, and if the law doesn't entitle you to kill a trespasser yourself why would the law entitle you to set a trap for a trespasser. A trap may only act in the same scope a person has, a person may not kill a trespasser so neither may their trap. J Trollop- asked is setting a trap in itself a necessary and reasonable method of protecting property? Held the setting of the trap was to be seen as another security measure like electric fence or barbed wire. The state failed to discharge their onus in proving it wasn't reasonable or necessary. And it was necessary in that VW had tried in other ways to protect his property. VW acquitted ONLY cause the trap was proved reasonable and necessary RATIO: GEN RULE- attack that have commenced are imminent are qualified in the case of protective devices. BUT protective device must be the only reasonable means available and there must be a clear warning of the protective device. There also doesn't need to be proportionality (when dealing with property) between the actual infringement and the steps taken to guard against the infringement.

EXAM: " the general rule is the attack must be imminent, in what case is the requirement of imminence qualified?
In VW - courts have qualified the requirement as long as it is reasonable and necessary"

S v mogohlwane (starosta fave case)	M was an impoverished man walking home carrying a plastic bag which had his shoes, clothes and some food in it. An assailant grabbed the bag but didn't attempt to run away because of M's frailty, the assailant also had an axe. M , who was close to home, went home and fetched a knife and before the assailant could attack him M stabbed and killed him

	State argued that the attack (taking the property) had already been completed , M had no viable defence because the was no imminence and M's actions were purely retaliatory. Court held- even though the initial threat of violence was completed, the continued possession of property by the thief meant that there was still unlawful taking and M's conduct was close enough in time and value to form part of the same *res gestea (* the unlawful act) Theft is a continuing crime so for as long as the thief is in possession, there is an unlawful act. **The actions of the accused were close enough in time to the original res gestea that the imminence requirement could be qualified in the circumstances.** M was justified in using force to retrieve his property BUT the court was quick to say that NOT EVERY PERSON IS ENTITLED TO USE FORCE - the defence has to be reasonable and necessary in the circumstances. M was a poor, old man, he had few options and the law wouldn't be able to assist him (police would just laugh). Note: if the thief had raised his axe to M it would be defence of self. Same res gestea = thief leaving your house - not down the road already.

R v Stephen	The accused heard an intruder coming through his window in the middle of the night. S didn't switch on a light, he grabbed a knife on his bedside table and stabbed the intruder. He said his intention was to stab the intruder in the arm but he stabbed his heart and the intruder died Court held- a man is entitled to resist invasion of his property especially at night BUT if they are going to use violence/lethal force they must at least **call out to the attacker** to stop and only persist with force if the attacker does not stop. (MAKING SURE THERE IS IMMINENCE) (if the window was not open but had been broken then attack would have commenced) M was convicted of culpable homicide but was given a very light sentence of 10 days. Ratio o At night you must call out before killing a suspected thief o Just being on the property is trespassing but does not constitute an imminent attack (arguable in SA) but attack must progress to more than trespassing. o Courts must punish unlawful and unjustified behaviour but they may give a lighter sentence if the behaviour is excusable.

S v	There was a dispute between divorced parents about access to their child. Father

Kamfer	had been through a legal battle and he was entitled by way of court order to have access to the child. When he attempted to see the child he was stopped by his ex-wife and her father, he attacked them and was charged with assault He argued that his right in terms of the court order could be extended to a proprietary right to his child, and he was acting in defence of property. Court held- there was no imminent attack regardless of the proprietary right or not. Right to access can only be enforced by court or sheriff of the court and not by violence. **It is undesirable to extend private defence to the use of force not designed to ward off danger to body or limb.**

IMMINENCE IN RELATION TO DEFENCE OF SELF

S v Patel	Accused came down the stairs one day in his brothers house and witnessed a man attacking his brother. His brother was crouched on the floor and as the attacker lifted his hammer to administer what seemed like the final blow, mr Patel took out his pistol and shot the attacker He argued self defence against the charge. Court a quo rejected the defence but on appeal it was asked **if you could use deadly force to protect a third party's interests?** **Is the fear that the mortal blow is about to be administered sufficient enough to qualify as an imminent attack?** Court held as to Q1 - **a person has the same right to defend himself that he has to defend another.** Q2- **fear of an attack alone is not sufficient!** accused must have reasonable grounds for thinking he or a 3rd party are in danger. This is an OBJECTIVE enquiry. On facts there was sufficient evidence for imminence. Courts will not be armchair critics and even though Patel had other means of stopping the attack : **when we are dealing with an emergency situation sometimes the only means we have may not be the most reasonable. (**hammer v gun) P acquitted.

S v Engelbrecht	Wife subjected to prolonged abuse tied up husband , put a plastic bag over his head and suffocated him She con tended self defence. Court - general rule is that when a victim had been subjected to prolonged abuse and retaliates there is no imminent attack. (particularly in cases where the abuser is killed when he is in a vulnerable situation ie: sleeping, back turned) So for defensive purposes it is better to use the defence of provocation rather

	than self defence. Test for private defence is objective - what would a reasonable person do in the circumstances - but this does imply that the courts must step into the victims shows to some extent. C - if the law is going to recognise pre-emptive measures like traps to protect property(relating to imminent attack) then there is no reason why an abused/battered woman cant be treated in the same way. Inevitability comes into play - where the abuse is frequent and results in a pattern then the imminence requirement is qualified (limited) because another attack will happen.

EXAM: arguably if you are scared and abused you probably won t get a protection order or any other measure - so the attack will be the only measure you have available. BUT you still need evidence to show that this was the only NECESSARY and REASONABLE way for you to defend yourself.
Also why is it better to argue provocation as opposed to self defence.

SUMMARY: IMMINENCE

1. Imminent = attack must have commenced and not yet finished or be about to be commenced
2. If attack has been completed then the force applied amounts to retaliation and revenge
3. Exception: if the defence is close enough in space and time to form part of the same *res gestea* then imminence requirement is qualified (*mokolwane)*
4. You cannot repel a expected future attack, it must be immediately pending
   2 exceptions
   - *VW*- when protecting property protective devices may be utilised for prospective attacks - if a warning is given and it is necessary and reasonable
   - *Engelbrecht*- if abuse forms a pattern to the extent that an attack is inevitable then you are entitled to anticipate that an attack is coming and act in self defence.
5. It is only an imminent attack if it is past the point of trespassing (*vw , stephen)* and there is a duty to at least call out before you kill the trespasser (dont have to call , jus act in some way to be certain it isnt just a trespasser)
6. Fear alone is not sufficient ground for believing you are in danger (*patel)*
7. *Patel* -you can act in defence of a third party
8. *Kamfer*- legal entitlement by way of a court order which is frustrated is not an imminent attack .

2ND REQUIREMENT : UPON A LEGALLY PROTECTED INTEREST

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S v kanfer	rights granted by way of court order cannot be protected by private defence/ IMPLICATION: violence force should ultimately only be used to defend tangible property, life and limb.

A legally recognised interest is an interest that is protected by law, must be linked to the law (like protected in the constitution)

Rights of a third party are also rights that can be protected with private defence - *Patel.* Generally protection of a spouse, child or family member is the third party but it can also be a stranger.

3RD REQ : UNLAWFULNESS (see below)

ELEMENTS NEEDED FOR DEFENCE

REASONABLE RESPONSE TO THE ATTACK

Your actions need to be objectively reasonable in the circumstances.
Patel - accused must have reasonable grounds for believing they/3rd party are in danger- echoes the objectivity of the test.

VW- in defence of property there needn't be a proportional relationship between the interest infringed and the rights threatened. *So property is not viewed as less important than life.*

(an assailant acts with dolus whereas the victim is innocent - so this is justified in certain circumstances)
NB - look at what the property is.

S v T	REASONABLENESS OF RESPONSE RELATING TO DEFENCE OF SELF A 16yr old boy was constantly bullied by an assailant for being younger, smaller and more sensitive than the other boys.one day the assailant and a group of friends came to T's house and asked him to fight. When T refused the assailant entered T's house and grabbed him. T produced a pistol and killed the assailant. T argued self defence- which the court a quo rejected. On appeal court held- the right of a child to self defence is protected just like an adult. **for reasonableness - where the victim's life is not in danger but is in danger of being maimed or seriously injured he is entitled to shoot and kill his attacker provided it is the only means possible to avert the attack.** **The right to bodily integrity is not less important than the right to life if the attacker acts with intention.** Court went on further to say - *while the test is objective , a bit of subjectivity should be used and the court must consider the personal circumstances of the accused and surrounding factors operating on the victim at the time.* (so if he had gone out to fight him then shot him- it wouldn't be reasonable) EXAM - use facts/surrounding circ for your argument. Court also said that - *weaponry cannot allow attacker to choose victim's mode of defence*. There needs to be a rough approximation on the basis of factors like age, gender , means at the parties disposal, nature of the threat and value of

	interest protected. Eg: a big man v slight woman - her killing him with a gun is arguably more reasonable than 2 big men v 1 small attacking woman and them killing her. BUT court isn't too nit picky. Summary ratio i. to be reasonable there does not need to be a proportional relationship between the means of attack and the means of defence BUT there should be a rough approximation based on above factors (killing someone for taking your handbag = not reasonable) ii. Look at the surrounding factors operating on accused at time of the attack iii. We cannot allow an attacker to choose his victims defence iv. If you life is not in danger but you v=can be maimed or seriously injured you may shoot to kill

Q : if your defence has to be reasonable and you have an opportunity to flee , are you under an obligation to flee or can you still take defensive measures.

R v Zikalala	assailant attacked the accused with a knife in a crowded bar.the accused had already dodged 2 blows by jumping over a bench and some people. Court held- ***where a man can save himself by flight he should flee rather than kill his assailant BUT he is not expected to flee if flight does not GUARANTEE him a safe escape.*** You are not legally obliged to risk a stab in the back. NB word guarantee.

S n Ntuli	where a victim acts in self defence knowing that they are using excessive force which may result in death and continue reckless of that - they are guilty of murder because they acted with dolus A victim who uses excessive force becomes the attacker and deadly force may be used against them.

S v Govender	there was an altercation between the appellant and the deceased when they had been gambling at the deceased premises. After the deceased sustained heavy losses he asked for a free call from the appellant which the appellant said not to. During an altercation later the deceased was shot and killed by the appellant There was conflicting evidence - friends of the dec said that the appellant approached and just shot him several times. The appellants and his friends version was the deceased accosted him to try get back his money.

	Court a quo convicted the appellant on the basis that he fired numerous shots and only 1 shot was necessary to ward off the attack. Also a shot in the mouth of the dec was excessive. On appeal the court found • The testimony of the deceased's friends was unconvincing - it was more likely there was an altercation • Since they are finding the appellants version more probable - he was justified in defending himself. • However - evidence was clear from both sides that the deceased had fallen to the ground after the first shot. Also the final shot to the mouth was shot from the deceased's gun. So the only inference that can be made the accuseds gun was empty so he proceeded to shoot with the deceased's gun. • Court concluded that at least the one shot to the mouth was excessive and not legally justified- appellant convicted Ratio: using force after the initial risk of harm has passed exceeds the bounds of private defence. This applies to all instances.

Summary reasonableness

- Reasonable is what is reasonable in the circumstances
- Need reasonable ground for believing you are in danger -*Patel*
- There must be a rough approximation between gravity of the attack and the extent of the defence BUT there is no need for interest threatened to be proportional to interest impaired - *VW*
- No need for equivalence in weaponry but it must be necessary and reasonable
- If you know you are using excessive force - DE is me and you are guilty of murder -*ntuli*
- If you continue to use force after the initial threat has passed you will be exceeding the bounds of self defence

2ND REQ : NECESSARY TO AVERT HARM

S v VW- necessary means that the defensive steps are the only ones available

Zikalala -if you are able to flee are your defensive steps necessary

- According *to Patel* - courts will not be armchair critics and they recognise that in the moment something that isn't the most reasonable may the most necessary
- According *to Zikalala* - there is no general duty to retreat from an unlawful attack and a man is only required to retreat if he is guaranteed a safe escape.

Don't forget the next 2 reqs in exam!

3RD REQ: MUST BE DIRECTED AT THE ATTACKER

4TH REQ: BE AWARE YOU ARE ACTING IN SELF DEFENCE (no ulterior motive for killing)

UNLAWFULNESS

An attack has to be unlawful - you cannot defend yourself against a lawful attack
Lawful attack= police officer with warrant for your arrest apprehending you.

Req 1 for unlawfulness *: in order to act validly in private defence you have to be responding to an*

unlawful attack

Problem: what if the attacker thinks he is acting lawfully?
What if it is perceived as unlawful but it is not?
What if the defender believes he is entitled to act in private defence in the circumstances?(similar to mistake!)

The test for unlawfulness is objective - this means that every element of private defence must exist objectively, thus the attack upon you must be objectively unlawful.

GENERAL RULE: if the defender perceives that any elements of the attack exist when they objectively do not - he has made a mistake and cannot rely on private defence.

In situations such as this the defender can rely on **PUTATIVE PRIVATE DEFENCE**

PPD is NOT a ground of justification! It does not affect the unlawfulness element because that is tested objectively.

It does affect culpability = mens rea ; effectively the defender / accused made a mistake- he had no

Intention to act unlawfully.

S v De Olievera ; S v Johnson confirm the following principles

1. PPD - it is not lawfulness in issue it is culpability

   TEST: if the accused honestly or genuinely believes that his life or property are in danger & this is the ONLY inference that can be made from objective factors - then the accused does not intend to act unlawfully and cannot be liable.

   The mistaken belief about the attack affects the formulation of intent.

2. To determine if the accused genuinely and honestly made this mistake ?
   By looking at obj. Factors and making inferences.

3. If the crime the accused is charged with requires dolus: the mistake must be genuine to negate fault

   Culpa: must be genuine and reasonable (would a reasonable man in the position of the accused have made the same mistake?)

S v De	acc lived in a dangerous area which was prone to robberies and house breaking.

olievera	One afternoon he and his partner took a nap and awoke to four unidentified men walking up the driveway. The acc then fired 7 shots through his window killing 1 man and injuring another. It transpired that the person who was injured was actually a friend and trusted employee and the person killed was his brother. When he realised it was his friend he stopped firing and rendered assistance Court - asked would a reasonable person in the position of the accused have acted in the same way? It is appropriate to use PPD in this case because the attack on the accused was not unlawful - merely trespassing. *If the accused honestly believes his life/property are in danger but objectively speaking they are not - the defensive steps he take cannot be lawful.* If in these circumstances an accused does kill - his conduct is unlawful BUT his dolus may be excluded if he made an honest and genuine mistake about the perceived danger. So the issue before the court was : was the requisite culpa or dolus present? Court confirmed that the way to establish *dolus or culpa is through inferential reasoning.* Looked at o Area prone to crime BUT o There was no indication of attack on house or occupants o Accused and partner were in comparable safety in a locked house So in the circ. It is inconceivable that a reasonable person could have believed he was entitled to shoot to kill especially without a warning shout or shot. The accused also did not testify which weighted against him. All they had from him was a statement to the police that he was half asleep and didn't know what he was doing- which could not be true since he had to retrieve his gun from a safe which had a lengthy pin code. Also he fired shots into a confined space where bullets could ricocheted. So the only inference which could be made was the accused foresaw harm occurring , foresaw acting unlawfully and he acted reckless of that - so he had dolus.

PPD - you need to genuinely believe that every element of private defence is met (obj is attack imminent ; would a reasonable person think they are entitled to kill)

S v Joshua	acc was walking with wife in a park when a gang of youths approached them and took his wife's purse. He went home got his shotgun and returned to the gang of youths where an altercation ensued , he kills 3 youths and injures 1. the youth ran

	to a house and the accused followed him - killed the owner of the house, another person and the owners dog Court in response to 2nd attack: the evidence before the court showed that the accused was unprovoked- the manner in which they were shot (in the back) shows they were not threat to the accused. 1st attack: held that the youths had advanced on the accused and attacked him first and his defence was close enough to form part of the same *res gestea.* But when he returned evidence showed that the way in which the youths were shot meant they posed no threat (body positioned away from acc.) (would have been diff if they had been shot in the front) The court held that at this point and in the 2nd attack the accused had become the attacker . The accused could not reasonable have believed himself to be under attack. For PPD - *the belief you are under attack must be such that it excludes the possibility that you are acting unlawfully.* Here it did not.

Mugwena	**Auth that test is obj!** Officers from a police force in the northern province set out in search of a man Masala. Officers couldnt find him but ended up at the hut of Mugwena - an off duty police officer from the same force. They knocked on the door and evidence was that they heard the click of a gun, when the door opended and mugwena emerged with his firearm drwan one of the police officers grabbed him from behind, he broke free and another officer shot him 4 times. The appellant was M's wife, police said they killed M in self defense but the appellant argued they acted unlawfully in exceeding the bounds of justice. Issue: did self defense exist here? Court confirned that self defense is approprite when a victims life is in danger in the sens ethat there is an unlawful attack upon him , in circumstances where it is reasonable and necessary to act in violenjce to ward off an attack. Reasonable meaning that the defensive steps must not be excessive in relation to the danger. Necessary meaning that there was no other means to avert the danger. **Test is objective : would a reasonable police officer consider this an imminent attack which could only be warded off by killing?** *Use inferential reasoning to establish the factual situation when there is conflicying evidence!!*

	Obj factors • Nightime • Same force- knew each other • They approached him • He ddint shoot or threaten , he couldnt see Since they were member s formt he same force it was highly imptobable they didnt know each other and if they ahd called out to him he sould have reocgnised theior voices- he wouldnt have emerged with a gun if he knew who they were. At night all he would have seen is silhouettes and it was reasonable that he came out with a gun. He at no stage attempoted to shoot so no court held that there was no real danger. M was also outnumbered 4:1 and he wouldnt have been difficult to restrain instead of just shotting. Police did not discharge their onus to porve on a balance of probabilities that shooting M was justified . Elements: imminence - no legally protected interest - yes their lives unlawful- arguable , he was only responding to them reasonable - no , excessive necessary - no could have restrained him.

Other class notes on...

C.1 <u>The Battered Woman Plight</u>

- What is the Battered Woman Syndrome? Focuses on the psychology of the battered woman.
- This syndrome helps lawyers to get a better insight into why abused persons do not resort to the apparently available options of running away or calling the police.
- The cycle of violence was developed by Lenore Walker in 1979 and set out 3 stages in the cycle:
    - Period of built up tension
    - Severe abuse
    - Apology by the abuser and undertaking not to repeat the violence, which makes the woman hopeful that the abuse wont recur but the cycle is repeated.

- Theories used to attain substantive gender equality in criminal law in context of battered woman who kill:
    - Psycho internalisation of hope that abuse won't recur, couple with feelings of shame and guilt lock woman into abusive relationships.
    - Internalisation of these emotions and societal perception that domestic violence is a private affair gives rise to a sense of "learned helplessness" in battered woman that causes her to believe that she has no alternative but to remain in the abusive relationship.

- The woman also feels that abuse will worsen if she tries to leave.
- Societal perceptions of domestic violence as private isolates battered woman from mechanisms of social support and reinforces her subordinate position.
- Issue under PD is that in theory the doctrine of PD cannot arise where there is no commenced or imminent attack but the victim has been subjected to constant physical or mental abuse.
- Non interventionist attitudes of agencies of social control such as police, courts, social welfare agencies premised on privacy of domestic abuse facilitates social control of woman by exasperating their structural isolation.

- How does the law respond to this plight? It has been submitted that it is better to examine the evidence of abuse as part of an inquiry into
  1. Lack of capacity due to provocation (Capacity which we will discuss at a later stage); or
  2. Putative Private Defence (Unlawfulness).

  Instead of under the self defence ground of justification.
- Illustrations of problems with general ground of PD:
  - Threat may not seem immediate: woman may kill shortly after abusers violent act in a non confrontational situation.
  - Deadly force may not seem necessary, abuser may be attacking with fists or making menacing verbal threats.
  - Here, BWS is used to support proof of elements with respect to defence to show the seriousness of the womans belief, expert testimony on BWS uses subjectified reasonable test to explain why a battered womans seemingly unusual behaviour may actually be reasonable.
  - Experts can explain that a woman may not be able to leave for socio economic reasons because of the fear that the abuser will follow her and inflict greater harm.
- Based on what we went through in previous lecture tell me why one should analyse this under Putative PD instead of under PD in general?
- PD refers to a single notion of a single threat that must at least be imminent.
- Putative PD refers a genuine belief (based on the history of abuse) that serves to create reasonable doubt regarding the knowledge of unlawfulness required for intention and an acquittal on a charge of murder could result.
- According to general principles the question would then become whether the belief was not merely genuinely held but also reasonably held in the context of determining the requirements of culpable homicide. In an extreme case a complete acquittal on a homicide charge could be entered if the abused person had acted as a reasonable person in the circumstances.

- Lets focus on Putative PD:
  – Relates to the mental state of mind of accused (different from private defence which is judged objectively).
  - Issue is one of culpability.
  - <u>Question to ask oneself is</u>: If the accused honestly believe his life was in danger but objectively viewed it is not the defensive steps taken cannot constituted PD. (Remember that you may exclude dolus in which case liability for death based on intention will be excluded).
  - So 2 questions before court:

1. Did the accused genuinely believe, although mistakenly, believe that he was acting in lawful private defence (intention to be proved); or
2. Whether this belief was also held on reasonable grounds (where negligence is sufficient for liability).

NECESSITY

21 August 2010
11:01 AM

The defence of necessity permits a person, in order to avoid harm to himself, to commit what is otherwise a breach of law.

Rationale : allows people who are faced with a choice of 2 evils in an emergency situation to choose the lesser of 2 evils.
(usually to break the law rather than suffer personal harm)

DEFINITION: a person acts in necessity if he acts in protection of his or somebody else's life, bodily integrity , property or any other legally protected interest - which is endangered by a threat of harm which is imminent or had commenced and cannot be averted any other way provided that the person is not legally compelled to endure the danger and the interest protected is not too out of proportion to the unlawful act.

Elements
1. Danger to a legally protected interest
2. An act or threat which has commenced or is imminent (no attack needed like PD)
3. Danger must not be cause by fault of the accused
4. Action by accused must be necessary to avert the danger
5. Means used must be reasonable
6. The danger must not be what accused is obliged to endure

Private defence vs. necessity

Similarities	*Differences*
• Both involve weighing up of harm or danger • Both resorted to protect a legally recognised interest • In both the defensive acts must be reasonable and necessary • In both you are not to act in a manner disproportionate to the extent of harm at risk	• PD is not a case of choosing between 2 evils. Guilty attacker and an innocent victim. Your choice is to protect yourself from 1 evil. • Necessity does not require an attack, a threat is sufficient for harm to be present. • PD requires an unlawful HUMAN attack, with necessity it doesn't matter whether the threat/attack is in the form of compulsion by human or non human agency (animal) • PD must be directed at the attacker & necessity usually directed at another innocent person (if your kidnapper tells you to kill the person next to you)

Absolute v relative force

Absolute force: where X does not commit a voluntary act - there is no actus reas is your defence.

Y grabs X's hand and stabs

C - X is involuntary.

Relative force: X does commit a voluntary act

Y threatens to kill X if he

doesn't stab C

You can necessity as a GOJ in cases of relative force.

REQ 1: Danger to a legally protected interest

A legally protected interest includes threat of death, bodily injury and property.
Also to protect the legal interests of a 3rd party (*s v pretorius* - speeding to get to hospital to save child)

Can you act out of necessity to protect a pecuniary (financial) interest?

R v Canestra	C had been using large nest to catch fish for his business. It was well known that very few of the fish caught were prohibited for being undersize. C charged with failing to adhere to a statute Can economic necessity justify breaking the law? Court - **no you cannot use an economic situation to justify the commission of a crime.** (if you could then theft by the unemployed would be justified) **Threatened harm must be of a physical nature**

S v Adams	Coloured family in apartheid moved into a white area because it was cheaper • **Economic factors cannot found a ground of necessity** • **Economic necessity is not sufficient to justify an otherwise unlawful act** **CRITICISM:** Test should be one of over-arching reasonableness (confirmed in *s v Werner)*

EXAM: PD, necessity and consent tested in 1 Q.

Req 2: imminent or commenced threat/attack

An actual attack is not required a threat is sufficient.
BUT there must be imminence.

- Likelihood that threat will be exercised for imminence
  Why? If the threat is not going to be exercised now you have time to flee, go to police etc.

S v Kibi	an accused was tortured and interrogated and lied in his testimony. Charged with perjury and he argued he lied because he was scared he would be tortured again. Lied out of necessity Court- The Accused must have experienced an explicit on-going threat. No on going threat = no necessity.

S v Mandela	acc had killed an acquaintance of his and his defence was necessity because a gang member had threatened him Court -there was an alternative solution because he was not being watched or followed. There was no imminence so no necessity. The accused must try to leave and to go to the police unsuccessfully before he can argue necessity. The Courts must be satisfied that the Accused had no way of warning the victim or had no means of avoiding the unlawful actions

What if you to the police and they do nothing? What do u think?

Battered woman syndrome (NB) - nearly all experts state that a woman should try leave an abuser before she can claim there was no alternatives.

Req 3 : dangerous situation must not have been cause by fault of the accused

-

S v bradbury	A man who voluntarily enters a gang knowing its disciplinary code cannot use compulsion as a defense.

R v Mohammed	Acc. Abducted a young girl, he was not immediately arrested and on the day in question the police came to serve him with members of her family. He knew one of the members had a gun and he wouldn't come out. Charged with obstructing justice - he pleaded necessity. Remember innocent until proven guilty. So he didn't directly cause the situation. An accused is entitled to act out of necessity to avoid anticipated danger (remember, a THREAT of harm is required, there does not have to be actual harm as long as the threat is imminent

Req 3 : HARM THAT THE ACC WAS NOT LEGALLY OBLIGED TO ENDURE

S v KIBI '78	Persons such as police officers, soldier and firefighters cannot avert the dangers inherent in the exercise of their profession by infringing the rights of others. A person cannot rely on necessity if what appears to be a threat is actually a lawful act e.g. a case of lawful arrest. This is harm that an individual is obliged to endure.

R v CANESTRA '51/ADAMs	Economic deprivation is a threat which one is obliged to endure

1. (other class next 2 points)

2. **Necessary for the accused to avert the danger**

- Duty to avoid the compelling force i.e should flee.
- Test: Whether considering all the circumstances a reasonable person would be expected to resist the threat.

3. Reasonable means to avert the danger

- The means used must be reasonable in the circumstances.
- Use the "Proportionality" test: Protected interest should be of greater value that interest which is infringed.
- Involves the difficult task of balancing competing interests.
- Some cases are easy. Everything ranks below life, the highest value eg A says to B, kick C or I will kill you…no problem
- Usually property (damage to/ loss of) will rank lower than bodily integrity eg Put a brick through C's windscreen or I'll beat you up. You must weight destruction of property against a slap.
- Most difficult issue is: can you kill another innocent person to save your own life? (NOTE: Whereas with PD we're dealing with force against the attacker, here, frequently the innocent third person is the victim – more difficult to draw hierarchy of competing interest.)

KILLING IN CIRCUMSTANCES OF NECESSITY PROPORTIONALITY

*Since necessity is based on a choice of the lesser of two evils, t**he general rule is that where the protected interest is greater than that of the interest infringed by the unlawful act then necessity will always serve as a defense.***

but what happens when the choice is between two evils of the same nature?
i.e. killing someone else v being killed yourself as opposed to just breaking the law to protect yourself

R v DUDLEY & STEPHENS '1884 (ENGLISH CASE)	Shipwrecked soldiers ate a cabin boy about to die. in English Law, killing an innocent person out of necessity can never be a valid defense - you can never kill someone and say it is the lesser of 2 evils This is still the position in English law **[R v HOWE '87]**

SA Law used to follow the same approach	German POW's were being kept in an concentration camp in SA and were instructed by a guard to kill another prisoner. They pleaded necessity (compulsion) as a GOJ because they feared harm to themselves and their

[R v WERNER '47]	families. Court held- an innocent person can never be killed out of necessity.

S v GOLIATH '72	X and Y were walking together when they came upon Z. Y asked Z for a cigarette and when Z said he didn't have Y stabbed him and ordered X to tie him up - he threatened X's life. Y then killed Z. X and Y charged with murder. Maj : court does not wish to uphold the highest moral and ethical standards. **A human is inclined to choose his life over that of another and law should allow a person to choose his own life.** The test for necessity is objective, whilst there is a greater duty to retreat than in the case of private defense, - *would a reasonable person have yielded to the compulsion in the circumstances.* An acquittal will be justified if the compulsion was such that a reasonable person would not be able to resist. If a reasonable man would resist the compulsion - you will not be convicted of murder (no dolus) but will be liable for culpa - you fell short of reasonable man standard. For the first time, the Courts recognized that the murder of an innocent person out of necessity could be justified. **IMPORTANT DISSENT BY WESSELS:** **This is a problem. Necessity should be an excuse and NOT a justification** Definition of excuse: accused did act unlawfully but his conduct is excused/allowed. So acc. Did something wrong but because of the circumstances he is not liable. **Practical problem: if killing in a situation is lawful, this means that the third party victim is unable to act in private defense of an act of compulsion since objectively speaking the attack upon the third party victim is lawful** **(because the person being compelled is acting out of necessity/compulsion…a legal ground of justification negating unlawfulness)**

EXAM:
If A compels B to shoot C, A is the attacker and B acts out of necessity/compulsion . C cannot act in PD against B because the attack is lawful. C doesn't meet the requirements for PD

Can C rely on PPD? This is not a case of unlawfulness! It is culpability.
Why? For PPD every element of PD must exist, C must believe B is the attacker. Can C believe B is the attacker if A is in the room? No! C will know A is the attacker.

Common purpose

25 August 2010
07:14 PM

where 2 or more people commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific conduct performed by one of their number if the conduct falls in their common design .

- Common purpose can occur by way of prior agreement or by way of active association

  -very controversial part of the law because it imputes conduct!

- There has to be some kind of criminal enterprise or design and only those acts which are part of the design can be imputed to group members

- It doesn't matter how small your part is in the unlawful design - as long as there is common design ,conduct is imputed.

Eg A,B, C meet one day to plan a robbery , they have a common design at the point they agree to rob. A drives the car, B will execute robbery and C will handle the splitting up of funds between them	Only B technically satisfies all the definitional elements of the crime but all 3 will be held liable for the robbery as perpetrators

The essence of common purpose is imputation/attribution.
BUT only acts forming part of the common design can be imputed.

(if someone was killed and was not part of common design and other parties couldn't foresee it - murder is not attributable)

GENERAL PRINCIPLES

1. **When 2 or more people have common purpose to commit a crime, the conduct of each in the execution of the common purpose can be imputed to the others**

2. **Where the charge of a crime requires causation - the conduct imputed includes the causing of the crime**

3. **Conduct by a member of the group which is different from the conduct envisaged in the common purpose MAY NOT BE IMPUTED to another member**
   Unless the latter knew that such conduct would be committed or could foresee the possibility that such conduct could be committed and reconciled himself to the possibility - DO DE ENQUIRY.

R v du Randt	A & B set out to rob a bank, A had a knife but assured B he didn't intend to use it except for intimidation. A &B failed in their attempt when a security guard attacked A, B rushes to help A and in the struggle A stabs the guard and he dies B was convicted of murder on the basis of common purpose because he impliedly gave A the mandate to kill by helping in the struggle = *by his actions he ratified that what A was doing was part of the common purpose.* *He showed that he agreed with what needed to be done when met with*

	resistance.

2 ways to look at this

a. argue that the prior agreement was extended in this case by B's actions
Or
b. B should be held liable by active association not prior agreement (new common purpose is resisting the guard - which B joined in with)

4. **A finding that a person acted in common purpose is not dependent upon proof of prior conspiracy - instead the existence of a conspiracy is inferred by conduct of the parties.**

5. **It is possible to prove common purpose by way of active association BUT on a charge of murder this can only apply if the deceased was still alive when the active association took place**

(NB remember this for mob situations)

6. **Fault is NEVER imputed , fault needs to be evaluated separately for each person. !!**

(on a charge of assault- accused may be negligent in hanging around with a gang that assaults people but there is no such thing as a negligent assault - so to be guilty we need to prove DE)
EXAM - go through normal DE and culpa enquiry.

PRIOR AGREEMENT

(also called mandate - mandate is not agency)

Mandate exists despite the fact that 1 or more members are not on the scene of the crime

*(*NB this is only true for prior agreement!)

Because if you ploy with a guilty mind you have fault and conduct is imputed to you.

- All that is necessary for common purpose by way of prior agreement is that there be a mandate(prior agreement) and conduct which is imputed falls into that mandate.

- Mandate can be express or implied (*r v du randt)*

ACTIVE ASSOCIATION

More controversial than mandate and usually relates to a crowd violence situation

DEF: participants have common purpose but there is generally no agreement between them.

R v Dladla	Accused armed with 2 sticks was at the from of a group which attacked and killed a policeman. Straight after he was part of a crowd which proceeded to pursue a 2nd policeman - he remained part of the crowd but was injured and was not in the front of the crowd Charge for 2nd officer: Court - on the issue of mandate , **since D himself was assaulted in the crowd frenzy it could be inferred that nobody really knew each other before**. It was

	difficult to prove prior agreement. In the killers of 2nd officer may not even have been aware of D's prescience. On issue of active association- court found it couldn't be proven beyond a reasonable doubt that D manifested the common purpose because he couldn't be proven he had committed an act of association (positive conduct) ***To prove AA there needs to be a manifestation of the common purpose through a positive act.***

S v Safatsa (1yr before mgedizi)	During a period of political unrest a crowd gathered outside the home of a township mayor. One member of the crowd urges people to go into the house of the mayor and burn it down. Other people urge crowd to start firing shots at the house and shots are returned from the house by the mayor. A woman then shouts lets kill him and a petrol bomb is thrown into the house. The mayor is also struck by a rock thrown from the crowd. Mayor dies and autopsy reveals he was alive at the time the house was burning down but also that blows from the rock could have killed him 8 people charged - 6 convicted of murder - appeal to AD 1st acc:struck mayor with rock and wrestled with mayor for his gun 2nd: threw stones and struck mayor in the back 3rd: found in possession of mayors gun 4th: urged crowd not to kill the mayor and slapped someone to stop him 5th: set kitchen door alight and set off petrol bombs 6th: instructed others on how to make petrol bombs None were instrumental in the murder Q: is it competent to find an individual liable for common purpose in the event that his conduct did not cause the death of the victim. Evidence suggested that none of hem materially caused death but common purpose does impute causation. So we only need to look at whether the participants did something positive to along themselves with the common purpose. 4th acc was liable because she committed other positive acts which showed she had aligned herself to the common purpose and she had DE in respect of these acts. ***You don't require something close to killing to be found liable- as long as there is some positive act , causation is imputed.***

S v mgedizi	NB for AA! **Requirements for common purpose by way of active association**

NB- exam	1. **Accused must be present @ scene where violence is committed** 2. **Acc must be aware of crime being committed** 3. **Accused must have intended to make common cause with those committing the crime** (prove fault) 4. **Acc must have manifested the sharing of the common purpose by himself performing an act of association** (in exam - look for positive conduct by the acc) 5. **Accused must have intended to commit or contribute to committing the crime** (if acc intention is assault but the person is killed - prove DE by using inferences could he foresee death occurring? If not, not liable for death ALL REQUIREMENTS MUST BE MET Facts: a 6 member team were sharing a room at a mining compound, during a period of unrest an attack was launched on the occupants of the room because they were believed to be informants. 6 died. A number of miners involved in the attack were found guilty of murder - appealed to AD. Court - **evidence against each accused has to be assessed individually - people cannot be held accountable as a block.** **common purpose imputes conduct and causation but we need to assess liability individually.** **The fact that 2 or more people share the same goal /motive is not sufficient - there must be conscious co-operation between them.** (so even if you have intention but no positive act - not liable)

<u>FAULT IN COMMON PURPOSE</u>

In common purpose fault is assessed individually.

For all dolus crimes DE suffices, if a killing occurs and only culpa is found - culpable homicide is the appropriate conviction.
So a participant to murder can be found liable for culpable homicide.

<u>Time MR is tested</u>

S v nkwenja	2 acc entered into prior conspiracy to rob a car. During the heist 1st acc shot owner of the car and 1st acc was killed in shootout Liability of 2nd acc: as far as mandate was concerned it was reasonable foreseeable that a shoot out would occur and killing of the victim did therefore form part of the mandate. Intention: MAJ- ***intention must be assessed at the time that common purpose arose.*** At the time common purpose arose there was forseeability of death.

	Is it fair for court to establish fault @time CP arose? Starosta - could be unfair because you ca change your mind at want to leave and then it happens and you are at fault. MIN DISSENT- just like with every other crime fault should be assessed at the time of committing the crime (echoes contemperainity principle) Burchell - agree with minority - says majority are introducing a type of versari doctrine. Majority decision has also been criticised for being overly inclusive (more people are found liable for a crime) AND under inclusive (if at the time of CP death is not foreseeable but as the crime proceeds it becomes foreseeable - at the stage it is foreseeable the participant not on the scene wont be liable - this example excludes murder!) Participants on the scene will be liable by way of active association not prior agreement - even if there was a prior agreement death was not foreseeable. EXAM: what is your view on this

Eg : 3 robbers decide to rob an empty house - death not foreseeable.
1 waits outside and 2 go inside where they are attacked by owner (they thought house was empty) they kill owner.

Outside accused not liable because he had no DE. Other 2 found liable by way of active association - killed him together.

<u>Withdrawal from common purpose - disassociation.</u>

FOREIGN CASES

R v Chinyerere	held - *an accused/conspirator should be able to withdraw from a crime even at the last minute* *- expressly rejected the argument that it is necessary for conspirator to try frustrate the common purpose*

S v Ndebu	*In certain cases something more is required than just running away* (didn't say what)

S v Beahan	*Actual role of perpetrator should determine what kind of withdrawal is necessary* where a perp has merely conspired but hasn't committed an overt act = running away or not showing up is sufficient Where the perp has participated in a more substantial manner = an effort to nullify or frustrate the effect of his contribution is required.

Part of the definition of theft is effectively depriving owner of possession of the article

So if your part is driving away the getaway vehicle and you hear gun shots on the scene and get scared and flee - can argue this isnt sufficient to disassociate but because he frustrated the plan and the element of depriving the owner of possession - it can be sufficient. His reason for fleeing doesnt matter because in court he can say anything. He has fault but can escape liability by disassociation.

CONCLUSION OF FOREIGN CASES

- You can withdraw at the last moment
- Running away may not be sufficient unless in running you frustrate the common purpose
- Whether you can disassociate or not is dependent on your actual participation in the crime.
- Frustration of common purpose can be a frustration of your part or any other part of the plan.

SA LAW

S v Nzo	1st acc was an ANC leader , 2nd accused was his underground contact who arranged accommodation for ANC members and storage of weapons. Mrs W was wife of a 3rd ANC member had threatened to lay charges against the 2nd acc and her husband for illegally harbouring ANC members. 1st accused overheard her saying this. He reported it to X and Y who proceeded to kill her 1st and 2nd acc were initially convicted of culpable homicide. There was not much evidence against 2nd accused but was argued that his involvement with ANC meant he had DE in respect of any crimes committed by ANC. So the arg was that the death against anyone who went against the aNC was foreseeable because of the weight placed on secrecy at the time. 2nd acc argued that he had **previously voluntarily given the police information about his involvement in aNC before killing.** Is this sufficient disassociation? C -***Co-operation with police not directly linked to crime is not sufficient disassociation.***

S v single	mob situation/**active association - diff from above cases which are PA** S was involved in a mob, in the frenzy he was hurt and left to go sleep. Crowd killed police. c- there is a distinct possibility that fatal wounds were administered after he had left. He disassociated himself from common purpose by leaving the scene.

	But it is *more difficult to disassociate yourself from prior agreement* because a req for AA is you have to be present and contribute through a positive action. *If you are not present you did not actively associate - by leaving he disassociated.*

COMMON PURPOSE AND CONSTITUTIONALITY

CP has been declared constitutional (*s v teubes)*

There is a potential human rights violation because common purpose detracts from the presumption of innocence and right to freedom & security of a person.

c- found that principles of common purpose do not affect the presumption of innocence because common purpose has to be proven as does fault.
The prosecution is just assisted by the imputation of 2 elements.

Innocence of a person trumps the fact that 2 elements are imputed because there can never be liability without a guilty mind.

JOINER-IN LIABILITY

Eg: A happens upon an attack . W is being attacked by X and Y who have already inflicted the mortal blow. A has no prior agreement with X and Y but picks up stones and throws them at W. W dies.

A is known as a joiner in. She isnt really a participant because the crime has already been completed (mortal blow) anf she is not an accessory because she doesnt help them evade justice.

A will not be liable via CP because there was no common purpose. A is also not an accessory as A didn't help X and Y evade justice.

What happens in a situation where ***someone happens one the scene AFTER the mortal blow has been dealt and does something to the victim?***

Answer

- If A's hurling of the stone hastened death - there would be no doubt about her liability as a clear causal nexus exists. (even if there wasn't CP)
- If A was involved in a prior agreement or active association - she would be liable via common purpose (still look at her intention though)
- If A arrived after the victim was dead - no liability.

  How do we attribute liability to A - where A didn't cause death and common purpose in not applicable.

  Law divided into pre 1990 and post 1990

Pre 1990

There was a disagreement in courts about the issue but

General approach was that a murder was not complete until the victim dies

In principle there was no reason to distinguish between causal and non causal association **(** i.e.: whether they causes the death or not is irrelevant)

Result: any acts committed before death could be said to be part of a common purpose and accused should be liable.

criticism	Liability for murder depends on responsibility for conduct that caused death. Murder is a consequence crime- only conduct that causes an unlawful event should be punished
Counter argument	Common purpose imputes causation anyway
2nd counter argument	In the situation there may be no common purpose- no prior agreement or act of association while they were engaging in the crime.

Post 1990

-

Motaung	A young woman believed to be a police informant was set alight and died Question before the court whether the 6 accused in a situation where it couldnt be proved they had joined in common purpose prior to infliction of mortal wounds. C accepted that there was reasonable prospect that the 6 had only joined in after mortal blows had been dealt. C held - *in a case of joiner in liability the acts of the immediate perpetrator could not be imputed.* (the acc must have arrived after all the acts leading to death have been completed) NB - t**o hold someone liable for murder on their basis of later association would amount to holding them liable ex post facto (retrospectively)** Court felt this was inappropriate - even if their is intention to kill the accused should only be liable for attempted murder. AUTH: own conduct with intent which doesn't cause death is attempted murder

attempts

20 September 2010
07:20 PM

EXAM!!!!

Common law : an attempt to commit a crime is a crime in itself
= liability is attributed to committing the crime and not being successful

The easiest way to prove liability is by testing for DE. You cannot have a negligent attempt - a crime of attempt must have dolus.

Criterion for holding someone liable

We need to evaluate at what stage of an act it becomes an attempt which can attract liability.

In search of the criterion we need to distinguish between completed and incomplete attempts

COMPLETE ATTEMPT: accused intends to commit the crime & **does everything he set out to do** in order to commit the crime but failed in his purpose through lack of skill, foresight or the existence of an unexpected obstacle (firing a gun and missing)

INCOMPLETE ATTEMPT: accused **has not completed everything he set out to do** because completion was rendered impossible by some outside agency.

Problem: there is a proximity issue - when are the accused actions close enough to the crime to consider it an attempt?
If you are stopped in your attempt how far must your actions have gone to suffice as an attempt?

PAST

r v ndlovu	A gave poison to B to put in C's food. B reported A and A was charged with attempted murder A gave B a mandate but there was still more to do for crime to be completed. Court - B had no intention of poisoning C , plan did not bring a within measurable distance to actual administration of poison - no attempt

S v lawrence	A conducted an interview with a banned person which he took down and sent to B in London with instructions to have it published. Mail intercepted before B got it and A charged with an attempt to publish prohibited materials Court felt there was an attempt as accused had done everything he set out to do.

The distinction between these two cases were 2 small so the courts developed 2 tests

1. THE COMMENCEMENT OF CONSUMMATION TEST

Accused is liable if court is satisfied from all the circumstances that at the time he was interrupted

he intended to complete the crime and

had carried his purpose through to the stage at which he was commencing the end of the crime

He had gone beyond mere preparation and had started on the last series of the act which would lead to ultimate crime.

Criticism: the line between the end of the beginning and the beginning of the end is very fine.

2. EQUiVoCALITY THEORY

Focus on the mindset of the accused rather than his objective acts.

Mentally has accused reached the point of no return?

Has he reached a stage where the only inference to be made is that he would have brought his plan to finality?

(EXAM - use both tests and make a value judgement- even though case law follows consummation test - say it doesn't allow parties to withdraw and change their minds then make your own decision)

Cases on tests

R v schoombie	Acc goes to a shop with petrol can and flammable material which he leads into the shop. He is interrupted by police and charged with arson This is an incomplete attempt - not lit the material. Q before the court - had he done enough to constitute attempted arson? Court confirmed this was an incomplete attempt and *applied commencement of consummation test.* Court felt he had started the last series of acts by leading the flammable material because petrol disappears so quickly - he was close enough to committing the crime. If equivocality theory had been used: since there no obj. Facts that he walked away or changed his mind the only inference to be made is that he intended to carry out his plan

R v sharp	X had a loaded gun and went looking for Y threatening to kill him if he found him. Y had gone into hiding and wasn't even in town. Is X guilty of attempted murder Court - NO! He has not reached *commencement of consummation.* Equivocality theory- not enough facts on his state of mind but his conduct is definitely still too far removed.

R v nango	One man standing over another on the floor with an axe above his head ready to swing Court - liable for attempted murder because all that was left was lowering of the axe

R v hlatswayo	servant put poison in porridge of her employers. Another employee saw her, threatened to report her and she then threw porridge away Court - she was found liable for attempted murder. She had done all that was necessary and *if she hadnt taken any further steps her employers would have eaten the porridge and died.* Court used *commencement of consummation test* - if she had left it they would have eaten it (don't get overly technical and say she would have to carry it to them) EXAM THIS CASE IS NB!!!!! *To establish if someone did all they intended to do - check whether there were any major further steps to be taken.* *At the time they were stopped / interrupted - would crime have happened in ordinary course of events?* Crit from starosta - there was an attempt but there is no scope for changing your mind Issue = change of mind! SNYMAN AGREES - SAYS CHANGE OF MIND SHOULD ALWAYS BE A DEFENCE Reasons • Purpose of punishment is deterrence - if someone voluntarily withdraws there is deterrence • Punishment serves a preventative function- if they withdraw the crime has been prevented • Punishment also looks to reform - by voluntarily withdrawing they have seemingly reformed <u>SUMMARY ATTEMPTS</u> COMPLETE ATTEMPT: **accused completes all he has set out to do** **Not problematic** INCOMPLETE ATTEMPT: **did not complete all he set out to do** **Act rendered impossible by outside agency** **Problem: at what stage of the act will the accused be deemed to have attempted the crime**

Schoombie: 2 tests

1. Commencement of consummation
    - Accused must have intended to complete the crime (AR and MR must exist at the same time)
    - Actions must bring about the beginning of the end
    - Actions must go beyond the mere stage of preparation
    - Practically- trying to say accused started on the last series of acts which left him with little scope to change his mind

2. Equivocality theory
    - More subjective - concerned with the accused's state of mind and not conduct
    - Can you say that mentally the accused has reached a point of no return (can be inferred)

Snyman (TB) - both tests should be used

(EXAM use both - say courts prefer com. Of cons. And make own decision)

Hlatswayo

- one school of thought says you can never have a change of mind in an attempt - so it doesn't matter at what point during your attempt you are apprehended (may be unfair!)
- Another school of thought says that AR and MR need to coincide (contemperainity principle) - so for an attempt you should be able to change your mind
-

There is no authoritative case law on change of mind - so because of contemperainty principle courts will accept an accused change their mind ON GOOD CAUSE!

<u>ATTEMPTS TO COMMIT THE IMPOSSIBLE (NOT NB)</u>

R v davies 1956	It is possible to attempt to commit the impossible

***Davies* gives a practically ludicrous result** - eg: if you attempt to shoot a bird with a water gun and in your mind you think the gun is real and the bird is human you would then be charged with attempted murder.

Courts have thus qualified *davies*

- If what the accused was aiming to achieve was not a

	crime, his act is not criminal Eg: if you think it is illegal to commit adultery and still do it , AR and MR coincide but adultery isnt actually a crime - you are not liable (putative crime is not a crime!)

Theft

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THEFT

For an accused to be found liable prosecution must prove each of the element s of a crime beyond a reasonable doubt.

Specific crimes have their own definitions so the elements which the prosecution has to prove may be amended.

BEST DEFENCE FOR THEFT : the accused had no intention to be unlawful

Eg:	Go to a shop , load your trolley pay for everything except something right at the bottom. The fact that you paid for the rest may show you had no intention to be unlawful
Eg:	If you load things into your bike helmet to carry it, if you pay for all your things except the most expensive thing- it is harder to show you had no intention of being unlawful.

DEFINITION

- **Unlawful**
- **Contractatio**
- **With intent to steal a thing**
- **Capable of being stolen**

(note: def doesn't relate to thing of another)

CONTRACTATIO (most NB for exam)

Contractatio is a technical notion of which it is difficult to the find an english equivalent

Literal meaning: touching , handling, dealing with

True definition: an assumption of control which law regards as sufficient

This gives the impression that you don't need to deprive the owner yet to be liable for theft

Practically - contractatio involves removal of property from an owner BUT according to common law this is not essential.

a. **Mere touching of a thing is not sufficient contractatio**
Under the common law control does not involve actual taking or removal but is rather an assumption of control

R v Carelse and Kay	Acc planned with a taxi driver B to move a petrol can in a shop to a box with empty petrol cans and when the owner threw out the empty cans the taxi driver would come and pick the full can up from the garbage. The owner knew of this plan and filled the said can with water which the taxi driver picked up Question before the court : Had A and B effected sufficient contractatio because no petrol had been taken? Court- it was sufficient contractatio *A had assumed control by moving the can to a location the owner didn't know about* (even though technically the can was still in the shop and owner still had possession of it) **Principle: to be liable you don't need to remove the item, a sufficient assumption of control can be moving the thing to a place the owner doesn't know about.**

Mapiza	Moving a box of cigarettes from storage to under the stairs to collect later by employee *This is a sufficient assumption of control*

SELF SERVICE SHOP/KIOSK

S V dlamini	An accused *who had no money on him* took a shirt from a shelf and put it under his jacket on his way to the till (hadn't left shop yet) Court - *contractatio was fulfilled* ***NB element here was intention*** Regardless of contractatio the likelihood that a theft will ensue is dependent on accused's intention *Snyman and Starosta critique the case!* *(how can you prove intention if he hasn't left the store?)* Snyman view: **contractatio shouldn't be looked a as an assumption of control but rather as an appropriation of control.** In order to appropriate you have to deprive the owner of his control and more specifically remove the item. <u>Snyman rationale</u> i. under *karelse and kay* there is *no room for an attempt* *ii. Karelse and kay doesn't allow the accused to change his min*d *iii.* Since intention requirement of theft requires the accused to intent to deprive the owner - the only way that intention can objectively manifest itself is by someone actually leaving the store - *courts should align contractatio with intention.*

	*(*theft must have dolus)

Tao	Follows Snyman - but is a provincial court case *Confirms that mere assumption of control is not sufficient to prove contractatio something further is required* - like excluding owner of his possession. Facts - T assumed control over gold in mine but security was so tight at the mine that he would not succeed at removing the gold (from this case arguably there is no assumption of control in *karelse)*

b. Theft of money

Contractatio is handling/ assuming control of an object BUT a credit transaction, internet banking and notional handling of money with *result of increasing your patrimony will suffice as contractatio*

Money is a fungible (consumed by use)
Question arises if you will be guilty of theft if you take money with intention of returning it.

Courts view *if an accused steals something which is consumable by use he is guilty of theft even if he intends to return it.*

Why? When an accused steals a fungible at the time of contractatio he cannot intend to give back the EXACT same thing

You do not intend to deprive the owner of full benefits of ownership BUT it is unlawful, there is contractatio, it is capable of being stolen and for that time you are depriving owner of that specific thing - liable because intention is judges at time of contractatio.

S v graham	acc company experiencing financial difficulty. A debtor sent a cheque to pay a debt which had already been paid off. The owner cashed the cheque with the intention to pay debtor back when company had money again Court - *contractatio in relation to money we look at the economic effect of the act and not necessarily the physical handling*

R v Manuel	a woman living in Egypt met a man in SA over the internet. He agreed to marry her after he divorced his wife and she sent him money for airfare to Egypt. It later transpired he used the money to marry someone else after his divorce Court- *money had been given to him for a particular purpose and was considered to be trust money* - ***when trust money is used for a purpose other than what it is entrusted for it is considered theft.*** (trust/purpose - can be tacit or verbal)

R v Schoulides	an individual bought something and was not given change Question - is handing over of an amount an intention to give full amount if you expecting change? **This court confirmed that this is an issue of trust money=** you have entrusted them with your money for a particular purpose but only a portion of it is needed - *there is an unspoken agreement that you will be given back what s not needed.* ***Court - when a customer hands over money he does not intend to make the seller the owner unconditionally - only until the amount taken needed and the change is given does the seller become the owner until that point it is trust money.*** **MONEY THAT IS USED FOR ANY OTHER REASON THAN WHAT IT IS ENTRUSTED FOR IS THEFT.**

DEFENCE TO BE USED WHEN MONEY HAS BEEN STOLEN
(exam)
Existence of a liquid fund

RULE: an accused does not commit theft if he has a liquid fund large enough to enable re-payment.

ONLY APPLICABLE FOR THEFT OF TRUST MONEY!

REASON: the essence of money given in trust is the elimination of risk - if it possible for the accused to immediately repay @your request then you have not suffered any loss.

Link to contractatio- if this is the case then Snyman is correct in that contractatio requires the dispossession of the owner.

(NB - practically speaking if you can afford to pay back immediately why would you steal in the first place unless you intended to steal - you will be liable)

NB NB NB NB NB EXAM Q!!!

BEES ROUX case- did police steal the car - Q1 - theft inquiry

Q2 - is there a GOJ

A for Q2 - PPD - no real private defence but he thought he was acting in private defence

- Look at all the facts given! If metro cop got in the car to drive him home but actually went in an opposite direction - may show intention to steal.
- If metro cop drove him home but arranged no other way to get back to his police partners - may show intention to steal
- Go through req for private defence of property - is there anything indicating imminence - no - so go to ppd
- Problem with ppd : it would fail on reasonableness and necessary (this should be the bulk of your answer!)
- Look at all his available means, did he exceed the bounds - definitely liable for culpa if not murder

- Only mention intoxication briefly but do mention for extra marks
- Note: metro may pull you over on suspicion, also they have the discretion whether to charge you or not - so whether the correct procedure was followed or not is irrelevant.

Other hints: 3 questions - each with specific crime and a GOJ

- GOJ and theft NB
- Contractatio know very well!
- No assault or robbery
- Theft, fraud and rape definitely tested.

INTENTION TO STEAL

ANIMUS FURANDI : intention to steal

Intention in respect of theft has a double requirement:

- The normal rules relating to dolus apply as determined by mens rea (DE is sufficient)
- There must also be *intention to deprive the owner permanently of full benefits of his ownership.*

To gauge if someone intended to deprive the owner permanently - we use objective factors to make inferences and that inference needs to be the only inference that can be made.

EXAM TIP: if it is clear that there is dolus directus and other facts show a clear intention to steal - dont need to do DE enquiry , just show dolus directus and find obj factors to infer intention to deprive owner.

R v sibiya	Accused took owners car from garage intending to return it after a joyride Court - **no theft because accused could show he intended to return the car** *If on a balance of probabilities an accused can show he intended to return the property or show he didnt intend to permanently deprive the owner there is no theft.*

R v laforte	Facts same as above but on his return journey he totalled the car and left the scene without notifying anyone (he could foresee possibility of it being stolen) Question: when does contractatio occur? Answer: at the time A got into the car Court - A convicted of theft *If A abandons the res he cannot claim he intended to return it and did not intend to permanently deprive owner of ownership* ***because DE can be proven -*** when X abandoned the car he could foresee a real possibility of it being stolen and acted recklessly.

	NB : this case is not an exception to sibiya - in this case DE could proven thats all.

1 year **after sibiya - a statute comes into effect which makes unauthorised borrowing a crime.**

Exam: if it is a Q on unauthorised borrowing - discuss sibiya and laforte
If it is a Q on intention to steal - also discuss the above 2 cases.

Motive

Mention briefly under intention.

If you steal, take, appropriate without intention of benefiting yourself is it excusable?

R v kinsella	*prejudice to the owner is not an essential element of theft (if you steal to ultimately benefit the owner)* *Need to look at if all the elements for theft are met or not- motive irrelevant.*

PROPERTY CAPABLE OF BEING STOLEN

GEN RULE: in order for property to be capable of being stolen it must be

1. *MOVABLE:* must not be permanently attached to a fixed structure - must be detached first to be stolen

2. *CORPOREAL/ INCORPOREAL:* in past only corporeals could be stolen but now incorporeal can also be stolen

3. *PROPERTY IN COMMERCIO:* it must be available or capable of forming part of commerce

4. *NOT RES NULLIUS, RES COMMUNES OR RES DERELICTAE:*
Res nullius: property that doesnt belong to anyone
Res communes: property belonging to everbrody
Res derelictae: property abandoned by owner with intention of ridding himself of it (not property that is lost!)

Implication: for something to be stolen it must belong to someone else

BUT it is possible to steal from yourself - *furtum possessiones*

R v janoo	J was expecting a parcel of goods to come by train which he would collect from the station- he couldn't go retrieve on the day in question because the office was closed. he jumped the fence to the cargo hold and took his package. He is convicted of theft and appeals the decision Court - SA railways has legal right of retention over cargo until proper bureaucratic procedures are met.

	This constitutes a proprietary right . Accused liable for theft.

R v roberts	X took his car to garage for repairs. Before paying garage in full he removed his car without garages permission Court -*garage had a lien over car which gave it legal right to possess car until payment*

UNLAWFULNESS

The taking of someone else's property is always unlawful unless you have their consent or there is a GOJ present

In re R v maserow	Police arrested A for being in possession of stolen brandy, some bottles were given back to him to lure him into a trap. Court a quo said since he left police station with consent of police to take bottles they were no longer stolen AD - trial court incorrect in their reasoning because police werent the owners and thus couldnt give valid consent. *Principle : only a true owner can give consent and deprive the act of its criminal nature.* ***In respect of unlawfulness relating to theft : only a person with a legal right to the property can give consent.***

In re R v gesa ; R v de jongh	in both: A threatened B with personal violence in order to gain possession of a thing belonging to B. B simply handed over goods instead of risking injury *Principle: whether or not somebody consented to handing over property depends on whether he was compelled in the criminal/necessity sense.*

Exam: to determine unlawfulness

- Acc to maserow..
- Acc to gesa & jongh
- Concl : the taking is unlawful without a GOJ

NATURE OF THEFT (not nb)

GENERAL RULE: Theft is a continuing crime

This means that as long as the stolen property is in possession of the thief - theft continues.

THEFT DOES NOT END AFTER THE INTIAL CONTRACTATIO IS EFFECTED.

Legal consequences of this rule

- *Procedurally- it expands the courts jurisdiction.*

Queen v Philander Jacobs , R v Judelman	A court has jurisdiction to try and convict a thief if he is in possession of stolen property in their area of jurisdiction irrespective of where the object was stolen

- *Substantively - iro degrees of participation where B helps A after the commission of the crime ,before A has gotten rid of the stolen item , instead of B being an accessory B may be tried as a principle to the crime.*

(by active assoc or as an accessory)

S v Cassiem	a woman worked in flea mkt selling clothes from well known chain stores with their original price tags on. A policeman became suspicious about this and asked her where she lived- she gave the wrong address and when he did eventually go to her house he found in the wardrobe 5 plastic bags full of clothes to value of 60 000. she initially said the clothes belonged to her daughter but later said her husband gave her the clothes to sell and she didn't know where they came from Court held- *theft continues for as long as* • *stolen property is in possession of thief* • *Possession for a person who is party to the theft* • *Possession of person who is acting on behalf of thief* • *Possession of any person who has dolus.* Issue : did she know the goods were stolen? If she did - it proves she has intention to permanently deprive the owner of benefits of ownership. Court - even though the contractatio was not undertaken by the accused - since theft is a continuing crime she can be liable for theft. To establish her intention: we use objective factors to make inferences and since theft is dolus crime proving DE is sufficient Could she FORESEE A REAL POSSIBILITY THAT CLOTHES WERE STOLEN AND ACT RECKLESS OF

	THAT POSSIBILITY? In this case factors showed yes. ***Ratio: if you receive stolen goods knowingly - you risk being potentially liable for theft.***

fraud

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29 September 2010
10:11 AM

EXAM TIPS!

you need to convince the marker you know 90% of the work on the topic - so study each topic separately and have an idea of what you will write for each topic so that when you walk into the exam you can just put down what you know and the only hard part will be applying the facts.

THEFT!- we spent the most time on contractatio - so the bulk of the marks for theft will come from contractatio

The law on theft is always the same- so even when exam is different from past papers, don't freak out, be calm, put down the law and apply the facts.

GOJ- identify which ground it is and put down the law - engage with the facts , your mark is 40% application

SELF DEFENCE NB!

EXAM Q: if someone gets into your car with the intention to steal it , they turn on the ignition but before car moves he is apprehended by police - is this theft or an attempt?

Look to contractatio! Set out law on theft using karelse and kay , and snymans view, show you know the two vies v=by giving case examples ke dlamini and then apply both vies but choose to follow 1 only (pref Snyman)
So if contractatio is not met - set out law on attempts and prove it is an attempt.
For intention always use obj factors to make inferences!

FRAUD

DEF: unlawful and intentional making of a misrepresentation which causes actual or potential prejudice to another

Because fraud is defined very broadly in potential to cause prejudice there is an overlap between fraud proper and attempted fraud.

(in exam- be very careful to distinguish a crime from an attempt)

Elements

- **Unlawfulness**
- **Misrepresentation**
- **Intention**
- **Actual or potential prejudice to another**

Fraud is the crime of a liar or a trickster and thus the essential element of fraud is misrepresentation.

Unlawfulness

- When a crime occurs unlawfulness is usually assumed except in the prescience of a GOJ

- BUT some forms of misrepresentation are not unlawful
  Eg: puffing - the law accepts that a trader will habitually exaggerate the virtues of his product and people need to exercise reasonable caution in what they believe

- Some types of misrepresentations cause a great deal of prejudice and are not unlawful
  Eg: misrep of love and affection to get someone to sleep with you

Misrepresentation

-

S v mieza	Most misreps are made by way of words but courts do recognise misreps by way of conduct

- A misrep can be made by silence , concealment or non disclosure
  The question to ask is : was there a duty to disclose?

  - A duty can be imposed by way of statute (company act req directors to disclose their financial interests

  - Where X's words are literally true but give a false impression- there is a duty to qualify

Marais v edelman	A selling his borehole said it had not malfunctioned once in 3 yrs - failed to mention those 3yrs were 14 yrs ago

  also *dimmock v hallertt*

  - Generally a seller of an article should disclose any defects he knows of unless it is sold voetstoets

  - There can also be a misrep of opinion(state of mind)

R v persotam	When buying goods on credit you represent 2 things 1. You are able

	2. And willing to pay for the goods *Auth: if you take goods knowing you are unable to pay - you are misrepresenting your state of mind*

R v deetleffs	X purchased and took delivery of a lorry - he gave a postdated cheque from a bank account which never received any money and on post date day the cheque bounced *Convicted of fraud because he misrepresented his state of mind (*look at obj factors to est intention for this)

EXAM: what is the diff between these 2 cases and paying with your card at a shop that says insufficient funds
= INTENTION (you don't have the intention to defraud)

- Misrep must be of an existing fact
  Misrep of future conduct is actually a misrep about your state of mind

Intention to defraud (NB)

Where the is no intention to defraud you are only lying and this is not criminal

Intention has 2 components

1. Have to have the intention to deceive
2. Have to intend by this deceit to induce another person to act to their detriment or prejudice

Eg	If you invite someone to your house and put out a painting to impress them by saying it's a real picasso	You don't intend to defraud and even if you did you arent inducing them to act to their detriment because you are just showing them the painting
	If your motive is different - if it is an art collector who you want to sell to	You have intention to decieve them and you want to induce them to act to their detriment by buying an expensive painting which is really fake

In re london & globe finance	Intention to defraud means: • To deceive - to induce a man to believe a thing is true which is false , which the person practicing the deceit knows to be false • To defraud- deprive by deceit - inducing a man to act to his detriment

Fraud is a dolus crime- so culpa will never suffice no matter how gross.

DE suffices for dolus and thus fraud
accused has to foresee the real possibility that his conduct, silence or concealment will induce another to act to his detriment and act reckless as to that possibility

Where a person makes a statement of which the truth he doubts - he will satisfy DE because he could foresee that the statement could be false.

- To prove intention to defraud we look to see whether thee accused intended to cause prejudice or could foresee causing prejudice - using obj factors to make inferences (sigwhala and mini)

  The more likely it is that objectively a misrep will cause prejudice - the easier it is to prove that accused foresaw the possibility (*r v henkies)*
  We ask would a reasonable person forsee that prejudice is likely to occur

- Intention to defraud does not require an intention to make a gain- only that you intend for someone to act to their prejudice

  In fraud motive is irrelevant in determining if you have the intention to defraud but can help to evidence an intention to deceive
  (if X makes a misrep foreseeing that Y will be deceived and act to his detriment - it is irrelevant that X's misrep is a joke)

  EXAM! Fraud tested with attempts-particularly attempts to do the impossible

Potential and actual prejudice
(bulk of exam Q)

2 general propositions on how to deal with prejudice
1. Potential prejudice suffices - dont need to prove actual prejudice
2. Prejudice neednt be proprietary (in exam give examples and distinguish!)

1. *Potential prejudice suffices*

- Dont need to prove misrep caused the actual prejudice because potential prejudice suffices
  Legal effect: because the definitional element of fraud are so wide it blurs the distinction between attempted fraud and fraud proper
  So the crime of fraud occupies much of the terrain that would normally be occupied by attempts.

Eg1	A offers to sell B a painting, unbeknown to A B is an expert in paintings and knows it is fake	Here there is no actual prejudice (no painting bought) and arguably no potential prejudice BUT a reasonable person is not an expert in

		painting and would be potentially prejudiced - so because of the potential prejudice this is fraud proper.
Eg2	You read in the paper that ppl with disabilities can claim a grant from the government. You fill in the application form and a false doctors certificate for your "disability".	There is potential for prejudice here- so this is fraud proper
Eg3	If you read the paper incorrectly and didnt see it was a grant for ppl with permanent disabilities and your certificate said temporary disability	This is an attempt - because you are attempting the impossible because there is no way you are getting the grant (in exam go into law of attempts of the impossible and Davies)

- What is potential prejudiced?

R Kruse	a misrep is potentially prejudicial if it is likely in the ordinary course of events to cause prejudice

R v heyne	the word likely doesnt mean prejudice must be certain or probable. It is enough if there is a rick of prejudice as long as it is not remote and fanciful

(confirmed by *s v ostelly ; s v kruger)*

A misrep is potentially prejudicial if there is a real possibility of it causing prejudice

For liability purposes it doesnt matter if the misrep was acted upon or even believed

- To establish whether there is a real possibility for prejudice we ask if the misrep is objectively prejudicial to an ordinary person with ordinary knowledge

R v dyonta	x attempted to sell glass as diamonds to Y who knew they were glass *Liability is attached to a misrep which is capable of deceiving an ordinary person with ordinary knowledge*

Why is an unsuccessful misrep still punishable as fraud proper?
State has an interest in protecting people and justice- wants to stop you defrauding other ppl.

- Existence of potential prejudice must be determined at the time the prejudice was made

Even if the facts are such that the misrep becomes true and no prejudice results.

But if misrep is true at the time misrep is made (unknown to guilty party) - it is an attempt at the impossible because there can never be prejudice.
Why? AR and MR need to coincide

An attempt at the impossible also occurs if the misrep is never made to another party to cause prejudice

(send a letter containing a misrep to B but B never receives the letter - no misrep was made= attempt because element of potential prejudice is not met

2. *Misrep neednt be proprietary*

- Misreps which materially inconvenience some aspect of public administration can amount to actual or potential prejudice

Frankfurt	Misrep neednt be prejudicial to whom it was made

In exam be practical and make a list of prejudices (eg: prejudicial to ppl losing out on fees, to other customers , t employees earning less.)

- Types of non-proprietary misrep can be
  - To state or society (*heyne and frankfurt)*
  - Exposure to prosecution (seabe)
  - Impairment of reputation (seabe)
  - Inconvenience of a system *(r v tabitha)*
  - Making people do something they wouldnt normally do (*r v deale)*
    A prejudice can be making people do something they wouldnt do otherwise EVEN if it has no less effect

- PREJUDICE MAY NOT BE TOO REMOTE OR FANCIFUL
  Even though the element of prejudice is wide

S v tshoba	If the factual causal nexus is very remote then liability will not be attached to the misrep- need to look for a real prejudice.

NEW CASES ON FRAUD

The new cases on fraud don't set out any new principles but do confirm the principles already established.

S v Yengeni	• Court confirmed that a misrepresentation can come about by silence if there is a duty to disclose information But a misrep itself is not criminalised- the misrep itself must have been perpetuated with fraudulent intent • Prejudice need not be toward the person to whom the misrep was made

S v Friedman	• Court confirmed the constitutionality of the wide ambit of the crime of fraud o Said there is nothing wrong with the approach which punishes fraud for the possibility of harm caused not actual harm caused